88-1661

Supreme Court, U.S.
FILED
APR 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RICHARD RIST, ACTING WARDEN
SOUTH DAKOTA STATE PENITENTIARY,

Petitioner,

v.

STEVEN SATTER,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF SOUTH DAKOTA

PETITION FOR WRIT OF CERTIORARI

ROGER A. TELLINGHUISEN
ATTORNEY GENERAL
State of South Dakota
Counsel of Record

Craig M. Eichstadt
Janine M. Kern
Assistant Attorneys General
State Capitol
Pierre, South Dakota 57501
Telephone: (605) 773-3215
Counsel for Petitioners

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER, UNDER OREGON V. ELSTAD, 470 U.S. 298 (1985), A SUBSEQUENT, VOLUNTARY, WARNED STATEMENT MAY BE RENDERED INADMISSIBLE BY THE "FRUIT OF THE POISONED TREE" DOCTRINE, MERELY BECAUSE A PRIOR IN-CUSTODY STATEMENT WAS GIVEN WITHOUT BENEFIT OF THE MIRANDA WARNINGS?

II

WHETHER, IF THE RULE OF ELSTAD RENDERS DEFENDANT'S SUBSEQUENT CONFESSION ADMISSIBLE, IT WAS HARMLESS ERROR BEYOND A REASONABLE DOUBT, CHAPMAN V. CALIFORNIA, 386 U.S. 18 (1967) TO ADMIT HIS PRIOR, UNWARNED CUSTODIAL STATEMENTS DURING THE STATE'S CASE IN CHIEF?

LIST OF PARTIES

Parties to the proceedings below, from the date of their inception, were the habeas corpus Respondent, Herman Solem, at the time, Warden of the South Dakota State Penitentiary, and the habeas corpus Petitioner, Steven Satter, an inmate at the Penitentiary. Petitioner Rist has been substituted as a party in this court, as Warden Solem retired effective March 17, 1989. Acting Warden Rist is now the custodian of Respondent Satter. See Rules of this Court, Rules 40.3, 40.4.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
OPINIONS BELOW	2
JURISDICTION	3
CONSTITUTIONAL PROVISIONS INVOLVED	5
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	16
CONCLUSION	40

TABLE OF AUTHORITIES

CASES

Chapman v. California,
386 U.S. 18 (1967) 33

Colorado v. Connelly,
479 U.S. 157 (1986) 28, 38

Colorado v. Spring,
479 U.S. 564 (1987) 28, 38

Delaware v. VanArsdall,
475 U.S. 673 (1986) 33

Duckworth v. Eagan,
cert. granted, 57 U.S.L.W.
3259 (1988) PASSIM

Fare v. Michael C.,
439 U.S. 1310 (1978)
(Rhenquist, J. in chambers) 38

Fare v. Michael C.,
442 U.S. 707 (1979) 38

Michigan v. Tucker,
417 U.S. 433 (1974) 28

Miranda v. Arizona,
384 U.S. 436 (1966) PASSIM

New York v. Quarles,
467 U.S. 649 (1983) 28

Oregon v. Elstad,
470 U.S. 298 (1985) PASSIM

Wong Sun v. United States,
371 U.S. 471, 486 (1963) 23

Wyrick v. Fields,
459 U.S. 42 (1982) 38

STATUTES:

28 U.S.C. § 1254(1) 4

28 U.S.C. § 2101(c) 4

S.D. Codified Laws Ann.
ch. 21-27 (1987) 3

OTHER:

U.S. Const. amend. XIV, § 1 5

Rules of the Court 20.2 and 20.4 5

NO. _____

IN THE

SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1988

RICHARD RIST, ACTING WARDEN
SOUTH DAKOTA STATE PENITENTIARY,

Petitioner,

v.

STEVEN SATTER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA

The Petitioner Richard Rist, Acting Warden, South Dakota Penitentiary, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of South

Dakota, entered in the above-entitled proceeding on January 4, 1989.

OPINIONS BELOW

The opinion of the Supreme Court of South Dakota dated January 4, 1989, is reported at 434 N.W.2d 725 (S.D. 1989), and is reprinted in the Appendix hereto, A-1. This was the court's opinion issued on rehearing. The earlier opinion of the South Dakota Supreme Court was dated April 20, 1988, and is reported at 422 N.W.2d 425. This opinion is set forth in the Appendix at A-38.

The Memorandum Opinion of the Circuit Court for the Third Judicial Circuit, Codington County, South Dakota issued on March 4, 1987, is unreported. This opinion is reprinted in the Appendix at A-85. The Findings of Fact and Conclusions of Law of the circuit court were not reported, but are reprinted in the Appendix at A-105. The

judgment of the circuit court entered March 19, 1987, is set forth at A-111.

JURISDICTION

This matter arose as an action for habeas corpus relief pursuant to S.D. Codified Laws Ann. ch. 21-27 (1987). Respondent alleged that his conviction, for two counts of murder entered on May 10, 1974, was the result of a violation of his rights against self-incrimination secured to him by the Fifth Amendment to the United States Constitution. A-114. After a hearing on the petition, the Circuit Court for the Third Judicial Circuit, Codington County, South Dakota, on March 18, 1987 denied the Writ of Habeas Corpus. See App. A-105; A-111.

On March 24, 1987 Respondent filed an appeal to the Supreme Court of South Dakota. The court initially reversed and remanded, indicating, without a firm majority decision, that the habeas corpus court should either

rehear the matter, or grant a new trial. See App. A-38. The State petitioned the Court to grant a rehearing on the merits. The Court granted rehearing in the matter, and on January 4, 1989, the South Dakota Supreme Court entered a decision again reversing and remanding. The Supreme Court held that the habeas corpus court should reconsider application of the "fruit of the poisoned tree" doctrine, since the failure to give Miranda warnings rendered a statement to former Codington County Sheriff Berg involuntary. See App. at A-14 to A-15. This decision rested entirely upon federal constitutional grounds.

This Court's jurisdiction to review this civil case is invoked under 28 U.S.C. § 1254(1); 28 U.S.C. § 2101(c); and Rule 20.2 and 20.4 of the Rules of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, amend. XIV, § 1:

> . . . [N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment 5:

> . . . [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . .

STATEMENT OF THE CASE

References in this matter to Respondent's trial transcript will be made by

the letters TT followed by the applicable page number; references to the habeas corpus transcript will be HCT followed by the appropriate page number. Reference will also be made to the Appendix if contained therein.

On the morning of August 20, 1972, Respondent Steven Alan Satter, at the time a professional burglar, TT 166; A-198 to A-199, entered a trailer house near Pelican Lake in Codington County, South Dakota, and shot and killed Kent Engle and Jerry Bowling. TT 175; A-212 to A-213; TT 195; A-242.

After killing Engle and Bowling, Respondent disposed of their bodies in a rock pile along an abandoned railroad track south of Kranzburg, South Dakota. TT 181-182; A-221 to A-222. Later, Respondent told two friends, Don Waba, Jr. and Rick Schmelling, that he had committed the murders, and he took Schmelling to view the bodies. TT 125, TT 201; A-252.

On March 1, 1973, Respondent's probation officer took him into custody for a probation violation. HCT 6; A-278 to A-279. Respondent met with his attorney, William Hackett, at the Codington County Jail, on March 3, 1973, and was visited by Mr. Hackett periodically during the month of March. HCT 8-9; A-280 to A-281.

Throughout March, law enforcement officers questioned Respondent on numerous occasions about burglaries in the area. HCT 10; A-283. On each such occasion, Respondent was informed of all his rights as required by Miranda v. Arizona, 384 U.S. 436 (1966). Although he did not recall the exact number of times he was informed of his rights, Respondent knew it to be more than five. HCT 33; A-295. Most of the law enforcement officers with whom he spoke in March 1973 read him his rights. HCT 12; A-284 to A-285. He admitted that in March he

talked to five local law enforcement persons and ten to fifteen out-of-state law enforcement officers that month. HCT 32; A-293.

At Respondent's trial, Curtis Berg, then Sheriff of Codington County, South Dakota, testified that on April 1, 1973, he received a call at home from a man who stated that Berg was not looking successfully for the bodies buried south of Kranzburg. TT 71; A-139. The caller then described where the bodies were buried, and told Berg that if the Sheriff needed more information he should go to the jail and question Respondent. TT 71; A-140.

Berg went to look for the bodies, but was unsuccessful. TT 72; A-140 to A-141. He went back to the Codington County Jail and questioned Respondent about some of the burglaries in the area. TT 72; A-141. Berg testified that he did not inform Respondent

of his rights pursuant to Miranda v. Arizona, supra, before or during this interview.

Berg then asked Respondent if he knew anything about two bodies that were supposed to be buried somewhere around the Watertown area. TT 72; A-142. Respondent did not answer yes or no to the Sheriff's question, but asked what criminal offense he could be charged with if in a hypothetical case Respondent had been paid $1,000 to destroy two bodies that had been buried. The Sheriff told Respondent that he could possibly be charged as an accessory. TT 76; A-148. No further discussion about the bodies occurred at this time, and Petitioner never requested an attorney or that the interview cease. The conversation went on to other subjects.

Later in the same conversation, Respondent voluntarily returned to the subject of the bodies. He told Berg that a man named Amilio Deluci of Minneapolis,

Minnesota, had come to Watertown to collect his share of the proceeds from a burglary committed by Jerry Bowling and another man. TT 77, 78; A-150. According to Respondent, Deluci, finding that the two men had spent his share of the burglary proceeds, killed them and offered Respondent $1,000 to burn up their bodies with a cutting torch. TT 78; A-151. Respondent stated that he could not bring himself to do it because of the smell, and he gave the sheriff directions to locate the bodies. TT 78, 79; A-151 to A-152. Berg, following these directions, located the bodies of Bowling and Engle buried in the rock pile south of Kranzburg. TT 79-80; A-154 to A-155.

On April 4, 1973, Division of Criminal Investigation Agent Delbert Peterson came to Watertown, South Dakota, to investigate the murders. TT 100; A-162. Peterson interviewed Respondent twice after fully

advising him of his rights pursuant to Miranda v. Arizona, supra. Respondent, at this time, fabricated another story about a man named Pianto who had killed the two men. TT 104-105; A-167 to A-168. At no time during these interviews did Respondent request the presence of an attorney, or that the interviews cease.

During the months of March and April, Respondent was given at least six polygraph examinations. HCT 49, 51; A-307; A-309 to A-310. He received Miranda warnings before each such test. He failed all of these polygraph examinations relating to this crime. HCT 50; A-308.

On April 11, 1973, Agent Peterson again transported Respondent to Sioux Falls, South Dakota for yet another polygraph examination. Respondent was once again informed of his rights pursuant to Miranda v. Arizona, and once again failed the polygraph examination.

Respondent, after failing the examination, decided to tell the law enforcement officers a more truthful version of the killings for the first time. TT 107; A-170 to A-171; TT 204; A-255; TT 216; A-274 to A-275; HCT 18; A-289 to A-291. Having failed the polygraph examination on all prior versions of his story, Respondent nonetheless requested that he be allowed to take an additional polygraph examination before his trial. See App. 12 at A-126; App. 13 at A-131, statement, second to last paragraph. Before giving this oral statement Respondent was again advised of his Miranda rights. The written statement was drafted after an oral interview with Agent Peterson. On the following day, April 12, 1973, (after Respondent again received Miranda warnings) the written statement was retyped and resigned to eliminate typographical errors. HCT 30; TT 189, 190; A-232 to A-234.

Respondent's claim, at the time of trial, was self-defense. Id. Respondent never denied, after April 11, 1973, that he had shot Engle and Bowling. See App. 12 at A-126, written statement of Respondent Satter, April 11, 1973; TT 216; A-275.

During the months of March and April, 1973, after being informed of his rights on at least ten occasions, Respondent gave law enforcement officers a great deal of false information about other crimes, and led them on several "wild goose chases." TT 121-122; A-195. Respondent had hoped that by giving information, albeit false, about other major crimes, he could somehow "beat the rap" by dealing himself out of a burglary charge in exchange for information. TT 203; A-255; TT 212-213; A-267 to A-271. He freely admitted changing his story often in hopes of finding a story that would be believed, and would hold up after a polygraph examination.

See HCT 46-47; A-302 to A-304; HCT 48-50; A-305 to A-310.

Respondent was convicted of burglary or grand theft four times between 1967 and 1974. TT 166-167; A-198 to A-200; TT 185; A-227; TT 187; A-229 to A-230. He admitted committing at least forty burglaries in South Dakota and Minnesota immediately prior to the murders. TT 185; A-227. Respondent was a career criminal familiar with the criminal justice system. App. 19 at A-370.

In 1978, Respondent escaped from the South Dakota State Penitentiary and threatened to seek revenge against those who investigated this crime and their families. See Affidavits In Support of State's Stay Motion, App. 19 at A-370. He was captured and continues to serve his life sentences for the murders of Jerry Bowling and Kent Engle.

The issues sought to be raised were presented by Respondent in his application in

South Dakota Circuit Court. App. 8 at A-114. The Petitioner denied the grounds for relief in his Return to Writ. App. 10 at A-121. The Circuit Court passed on these grounds and denied relief. App. 4 at A-99 to A-102 and App. 6 at A-108 to A-109. In the South Dakota Supreme Court, Petitioner presented the issues sought to be raised in three separate briefs, as required by South Dakota Procedure. App. 17 at A-328 to A-333; App. 18 at A-341 to A-349; App. 19 at A-365 to A-369. The South Dakota Supreme Court found that since the initial statements (not now at issue) were improperly admitted, a remand was necessary to determine whether the Elstad-type statements were admissible. App. 1 at A-13 to A-15. This ruling was made even though there was a finding that all statements were voluntary, App. 6 at A-108, which was unreversed by the South Dakota Supreme Court. App. 1.

REASONS FOR GRANTING THE WRIT

I

THE DECISION TO REMAND FOR RECONSIDERATION IN LIGHT OF THE "FRUIT OF THE POISONOUS TREE" DOCTRINE DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN OREGON V. ELSTAD, 470 U.S. 298 (1985); AND IT ALSO CONFLICTS DIRECTLY WITH THE DECISIONS OF SEVERAL CIRCUITS AND OF SEVERAL STATE COURTS.

A. Introduction.

This case raises the issue of whether a subsequent, fully warned statement, taken pursuant to Miranda v. Arizona, 384 U.S. 436 (1966) is rendered inadmissible because a previous statement, found to be entirely voluntary, was not preceded by Miranda warnings. This Court addressed this issue in Oregon v. Elstad, 470 U.S. 298 (1985), and held that where the second statement was preceded by Miranda warnings, the mere existence of the first, unwarned statement was not itself sufficient to trigger suppression of the second statement. The

Petitioner contends that in spite of the clear holding of Elstad, the South Dakota Supreme Court, in this case, improperly held that subsequent statements could be excluded merely because earlier statements were given without the benefit of Miranda warnings.

The habeas corpus court specifically held that all of Respondent's statements to law enforcement officials were voluntary. App. 6 at A-108. Only the April 1 statements to Sheriff Berg were unwarned. Admission of the statements given without benefit of Miranda warnings was improper. The rule announced in Elstad, however, permits admission of subsequent statements given after Miranda warnings, where all preceding statements are voluntary.

B. Admission of Subsequent, Voluntary Statements After Having Taken a Prior Statement Without Benefit of Miranda Warnings.

In Oregon v. Elstad, supra, this Court found statements by a criminal defendant admissible, where the statements were preceded by Miranda warnings, even though the Defendant made a previous statement while in custody without the benefit of the Miranda warning. In Elstad, the defendant told the police, while in custody, with regard to a burglary, "I was there." The statement was apparently made during the first contact between the police and the defendant. The State of Oregon conceded that the interrogation was custodial and not preceded by Miranda warnings. 470 U.S. at 302.

This Court began its discussion of the case by indicating that prior to Miranda, the admissibility of a statement made by an accused while in custody was judged solely by whether the statement was voluntary within the meaning of the due process clause. Elstad, supra, at 304. The Miranda

precedent, however, excluded many confessions and statements that would have been admissible under the "old due process standard." Elstad, supra, at 305.

The Court in Elstad explained that the Fifth Amendment prohibits the State from using compelled testimony in its case in chief. Statements given without benefit of the Miranda warning are subject to a presumption of compulsion. Thus, even statements that are voluntary in the traditional "due process sense" of the Fifth Amendment must be excluded if not preceded by warnings.

This Court held, however, that it was an unwarranted extension of Miranda to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a

subsequent voluntary and informed waiver is ineffective for some indeterminate period. Id. at 309.

Therefore, the Court concluded that even though Elstad's initial statement "I was there" may well have led to the subsequent confession that Elstad gave the police after Miranda warnings were administered, the "fruit of the poisonous tree" doctrine did not require the suppression of the later statement.

This Court, reaffirming the Miranda precedent, held that the unwarned admissions must be suppressed. The same was not true, however, for fruits of the unwarned admissions, where both the prior and the subsequent statements were voluntarily given.

The Court stated that although "[M]iranda requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement

should turn in these circumstances solely on whether it is knowingly and voluntarily made". Elstad, supra at 309. The finder of fact making this inquiry should evaluate the circumstances and the police conduct regarding the subsequent statement. Elstad, supra at 318.

This Court also stated that where a prior statement is taken in such a manner as to render it involuntary under the due process clause, the "fruit of the poisonous tree" doctrine would be applicable. The Court would, under such circumstances, be required to analyze the time that passed between the confessions, the change in place of interrogation, the change of the identity of interrogators, and all other factors that would bear upon whether the subsequent mirandized statement was tainted by the prior statement. Such an extended analysis was not required, however, where the initial

statement was not involuntary. Elstad at 310-312.

The Court emphasized that there is a vast difference between statements taken without benefit of Miranda warnings and those coerced in violation of principles of due process. Failure to administer Miranda warnings does not mean that the statements taken without them have been actually coerced, but only that the courts will presume that the privilege against compulsory self-incrimination has not been intelligently exercised. Oregon v. Elstad, supra, at 310. Even prior to Elstad, the majority of courts explicitly or implicitly recognized that no break in the stream of events was required for admission of the second, warned statements. Id. at 310-311, n.2. A careful and thorough administration of the Miranda warnings serves to cure the condition that rendered the unwarned statement inadmissible.

Id. at 310-311. The warning conveys the relevant information and thereafter the suspect's choice, whether to exercise his privilege to remain silent, should ordinarily be viewed as an act of free will, Id. at 311, citing Wong Sun v. United States, 371 U.S. 471 at 486 (1963).

The Petitioner contends that this holding is plain and unequivocal. The lower courts have applied the Elstad decision in numerous factual situations where subsequent, warned statements were admitted,[1] even though

---

[1] United States v. Johnson, 816 F.2d 918, 923 (3d Cir. 1987); Bryant v. Vose, 785 F.2d 364, 366-367 (1st Cir. 1986); United States v. Packer, 730 F.2d 1151 (8th Cir. 1984) (pre-Elstad); Kight v. State, 512 So. 2d 922 (Fl. 1987), cert. denied, 108 S.Ct. 1100 (1988); Bush v. State, 523 So. 2d 538, 557 (Ala. Crim. App. 1988). Several cases have held fairly directly that the fruits of any statements obtained through a non-coercive Miranda violation may be admitted, in spite of the Miranda violation. United States v.

(Footnote Continued)

there was an earlier unwarned statement. The

(Footnote Continued)
Galberth, 846 F.2d 983 (5th Cir. 1988); United States v. Benguivenga, 845 F.2d 593, 600 (5th Cir. 1988); United States v. Cherry, 794 F.2d 201, 206 (5th Cir. 1986), cert. denied, 107 S.Ct. 932 (1987); prior opinions, 759 F.2d 1196, 1208-1210 (1985); 733 F.2d 1124 (1984) (physical evidence discovered through Miranda violation admissible); Stawicki v. Israel, 778 F.2d 380, 382 (7th Cir. 1985), cert. denied, 107 S.Ct. 150 (1986).

See also United States v. Richmann, 860 F.2d 837, 840-841 (8th Cir. 1988) (alternative holding; defendant not in custody); United States v. Galberth, 846 F.2d 983, 992-994 (5th Cir. 1988) (physical evidence; no custody); United States v. Bengivenga, 845 F.2d 593 (5th Cir. 1988); United States v. Waunecka, 842 F.2d 1083, 1087-1088 (9th Cir. 1988); earlier opinion, 770 F.2d 1434 (1985) (unwarned statements held voluntary, therefore post-warning statements admissible); United States v. Gentry, 839 F.2d 1065, 1074 (5th Cir. 1988) (same); United States v. Lewis, 833 F.2d 1380, 1386 (9th Cir. 1987); United States v. Johnson, 816 F.2d 918, 922-923 (3d Cir. 1987); United States v. Hall, 805 F.2d 1410 (10th Cir. 1986); United States v. Cherry, 794 F.2d 201, 207-208 (5th Cir. 1986), cert. denied, 107 S.Ct. 932 (1987); United states v. Cervantes-Gaitan, 792 F.2d 770, 773 (9th Cir.
(Footnote Continued)

South Dakota Supreme Court, and a few other courts[2] have refused to apply this holding. Thus, a conflict has been created, requiring resolution by this Court.

(Footnote Continued)
1986); United States v. Morales, 788 F.2d 833 (2d Cir. 1986) (arrest based on non-Miranda statement's fruits is not unconstitutional); State v. Stuck, 154 Ariz. 16, 739 P.2d 1333, 1336-1337 (1987); Cowan v. United States, 547 A.2d 1011 (D.C. App. 1988); Perry v. State, 522 So. 2d 817, 819-820 (Fla. 1988); Caplinger v. State, 185 Ga. App. 476, 364 S.E.2d 610; People v. Shuff, 158 Ill. App. 3d 157, 110 Ill. Dec. 274, 510 N.E.2d 1305 (Ill. App. 1987); State v. Tinkham, 510 A.2d 520 (Me. 1986); In Re Owen F., 70 Md. App. 678, 523 A.2d 627, 631-632 (1987); Pruett v. Commonwealth, 232 Va. 266, 351 S.E.2d 1, 5-6 (1986), cert. denied, 107 S.Ct. 3220 (1987); reh'g denied, 108 S.Ct. 12 (1987). (Alternative holding; no custody also found.)

[2] Eagan v. Duckworth, 843 F.2d 1554, 1557-1558 (7th Cir. 1988); cert. granted, argument scheduled 3-29-89, 57 U.S.L.W. 3598 (1989); State v. Hoeplinger, 206 Conn. 278, 537 A.2d 1010 (1988); Caso v. State 524 So. 2d 422, (Fla.), cert. denied, 109 S.Ct. 422 (1988); State v. Berg, 112 N.J. 45, ___, 548 A.2d 846, 858-861 (1988); State v. Hartley, 103 N.J. 252, 511 A.2d 80, 95-99 (1986).

In the present case, the South Dakota Supreme Court found, among other things, that the admission of earlier, unwarned statements was not harmless error because of the "fruits" that the statements bore. At a minimum, this harmless error analysis is seriously flawed because of the South Dakota Supreme Court's refusal to apply Elstad and the other cases following it. In Elstad, supra at 305-306, this Court held that the fruits of a Miranda violation are not to be excluded absent an actual fifth amendment violation. Nearly all cases that have considered the matter have found that admission of an oral unwarned statement, which is less inculpatory than a subsequent, written, warned statement is harmless.[3] The

---

[3]United States v. Johnson, 816 F.2d 918, 923 (3d Cir. 1987); Bryant v. Vose, 785 F.2d

(Footnote Continued)

issue has not, however, been decided by this Court, although it may be at issue in Duckworth v. Eagan, cert. granted, #88-317, 57 U.S.L.W. 3259 (1988), argued March 29, 1989.

C. South Dakota Supreme Court Analysis.

The South Dakota Supreme Court decision is in clear contravention of this Court's

---

(Footnote Continued)
364, 366-367 (1st Cir. 1986); United States v. Packer, 730 F.2d 1151 (8th Cir. 1984) (pre-Elstad); Kight v. State, 512 So. 2d 922 (Fl. 1987), cert. denied, 108 S.Ct. 1100 (1988); Bush v. State, 523 So. 2d 538, 557 (Ala. Crim. App. 1988). Several cases have held fairly directly that the fruits of any statements obtained through a non-coercive Miranda violation may be admitted, in spite of the Miranda violation. United States v. Galberth, 846 F.2d 983 (5th Cir. 1988); United States v. Benquivenga, 845 F.2d 593, 600 (5th Cir. 1988); United States v. Cherry, 794 F.2d 201, 206 (5th Cir. 1986), cert. denied, 107 S.Ct. 932 (1987); prior opinions, 759 F.2d 1196, 1208-1210 (1985); 733 F.2d 1124 (1984) (physical evidence discovered through Miranda violation admissible); Stawicki v. Israel, 778 F.2d 380, 382 (7th Cir. 1985), cert. denied, 107 S.Ct. 150 (1986).

mandates in Elstad; Michigan v. Tucker, 417 U.S. 433 (1974); New York v. Quarles, 467 U.S. 649 (1983); Colorado v. Spring, 479 U.S. 564 (1987); and Colorado v. Connelly, 479 U.S. 157 (1986).

Initially, the South Dakota Supreme Court failed to recognize that a difference exists between an involuntary statement and one taken in violation of the dictates of Miranda. To the contrary, that Court specifically equated involuntariness with failure to administer Miranda warnings. App. 2 at A-13 to A-14. Yet the entire premise of the Elstad decision was that even though an initial, unwarned statement is excluded, subsequent statements, although flowing from that initial statement, are admissible if knowingly and voluntarily made.

Petitioner argued alternative positions to the South Dakota Supreme Court. First, Petitioner argued that it was not reversible

error to fail to mirandize Respondent because he was not in custody for the crime he was being questioned about, he was familiar with the legal system and had been repeatedly mirandized during the preceding month and further that his initial statement was not incriminating. App. 16 at A-323 to A-328; App. 17 at A-336 to A-341; App. 18 at A-352 to A-365. Alternately, the State argued that assuming that there was a presumption of compulsion created by the failure to mirandize, the holding in Oregon v. Elstad required that the subsequent mirandized statements were admissible if voluntary. App. 17 at A-328 to A-333; App. 18 at A-341 to A-349; App. 19 at A-365 to A-369.

The South Dakota Supreme Court rejected the Petitioner's contention that the initial unwarned statement was admissible on other grounds. App. 1 at A-10 to A-13. The Court found that a presumption of compulsion was

created, which would exclude the initial unwarned statement. The Court, however, then incorrectly equated this presumption of compulsion applied to the first statement with automatic involuntariness and exclusion of all subsequent warned confessions. A-13.

The South Dakota Supreme Court's decision did not find any due process involuntariness in the taking of the initial, unwarned statement. A-12 to A-14. The South Dakota Habeas Corpus Circuit Court specifically found that all statements were voluntary. A-108. The South Dakota Supreme Court did not reverse this finding, and based its holding entirely upon the failure to administer Miranda warnings before the initial statement. A-12 to A-14.

The South Dakota Supreme Court in its analysis sarcastically states, "the final premise that we deal with is that there were no deliberately coercive or improper tactics

used to warrant a presumption of compulsion. In other words, absent the use of the rubber hose, icy showers or marathon interrogations under bright lights, we should not presume that Satter's statements were involuntary." A-13. This quotation illustrates the failure of the Court to grasp the difference between a non-mirandized statement and an involuntary statement.

Since the factual findings of circuit court are clear, and the Supreme Court of South Dakota did not reverse them, this Court should apply the law clearly set forth in Elstad to the facts of this case, and reverse the South Dakota Supreme Court determination.

The Respondent recognizes that the South Dakota Supreme Court did not go the entire distance and require a new trial. Rather, it reversed for consideration of the "fruit of the poisoned tree" doctrine with regard to the second statements. Where a finding

already exists, however, that all statements are voluntary, and where this finding is unreversed, a remand is unnecessary and is contrary to the holding of Elstad, and the cases set forth in n.1 of this Petition. No extended analysis should be necessary to apply the Elstad holding. The facts relating to voluntariness have already been fully litigated and decided. As the initial statement was voluntary, although unwarned, Elstad requires that subsequent, warned, and voluntary statements are admissible. Elstad, supra, at 310-312.

D. Harmless Error Analysis.

The Petitioner acknowledges that the April 1, 1973, statements, which were voluntary but unwarned, were not admissible under Miranda, Elstad, or otherwise. Therefore, it is plain that Petitioner's first statement about a man named Amilio Deluci who had asked him to cut up the bodies

was improperly admitted at the Respondent's criminal trial in state court in May 1974. Respondent also told the sheriff at this time where Respondent had buried the bodies. The admission of such statements, however, is not necessarily reversible error. Chapman v. California, 386 U.S. 18 (1967); see also Delaware v. VanArsdall, 475 U.S. 673 (1986).

The South Dakota Supreme Court did recognize that it was required to engage in a harmless error analysis. App. 1 at A-12 to A-13. Analysis was flawed, however, by its unwarranted assumption, contrary to Elstad, that the "fruits" of the improperly admitted statement were themselves somehow tainted. Essentially, the South Dakota Supreme Court held that the admission of the initial statement was not harmless because the initial statements led to the bodies of the victims and to further statements by the Respondent. If, however, these "fruits" were

properly admissible, under Elstad, the South Dakota Supreme Court has not correctly analyzed the harmless error doctrine.

The effect of the error, whether harmless or prejudicial, must be calculated by weighing the effect of the introduction of the initial, unwarned statement on the jury. The effect of proper evidence should be to the benefit, not the detriment, of the State.

Petitioner contends that the first admission was merely a fabrication, and had little, if anything, to do with the Respondent's guilt. A-151 to A-155. In subsequent mirandized statements, however, Respondent admitted that he was the one who had pulled the trigger and killed the victims, although he claimed self-defense. App. 12 at A-126; App. 13 at A-131. Together with all other physical and testimonial evidence presented at trial, these subsequent confessions are more than sufficient to

render it highly unlikely that the initial statement had any prejudicial effect in Petitioner's trial. The South Dakota Supreme Court did not, however, reach this point, since it implicitly rejected as tainted all evidence that flowed from the initial statement. A-12 to A-13. This was, of course, improper under Elstad, supra. Since no proper harmless error analysis has been made, this Court should either undertake the analysis or reverse and remand for further consideration.

II

THIS CASE RAISES IMPORTANT ISSUES OF FEDERAL CONSTITUTIONAL LAW, WHICH HAVE NOT BEEN, BUT SHOULD BE, DETERMINED BY THIS COURT, PARTICULARLY WHERE THE SOUTH DAKOTA SUPREME COURT HAS EXTENDED THE MIRANDA EXCLUSIONARY RULE FAR BEYOND ITS PREVIOUS BOUNDS.

This case raises an important issue regarding the admissibility of voluntary statements and confessions of criminal

defendants. Of overriding significance is the fact that the Respondent knowingly and voluntarily made the subsequent, written statements after full and appropriate warnings as required by Miranda v. Arizona, supra.

In the present case, the South Dakota Supreme Court found that Satter's statements might be suppressed, even though they were given after full warnings, voluntarily, and without any claim of police misconduct or coercion. One of the primary reasons for suppression of unwarned statements is to discourage police coercion of statements. See Elstad, supra at 310-313; Miranda, supra at 449-455. This rationale is not even arguably furthered by suppression of the later, fully warned statements in this case.

In reality, the price of excluding Petitioner's confession is considerable. Elstad, supra at 304-305. In this case, for

example, a retrial would be required if the habeas court on remand were to find the subsequent statements excludable. The jury trial in this case was held over fifteen years ago. Witnesses have died. Memories have faded. In addition, if this case remains as precedent within the State of South Dakota, it is apparent that subsequent statements, even though given after full Miranda warnings, may be excluded simply because there was an earlier, voluntary but unwarned statement. Such a result is patently contrary to that in Oregon v. Elstad, supra.

Further, it is critical to note that the South Dakota Supreme Court's reasoning and holding are based entirely on the federal constitution and United States Supreme Court precedent. The South Dakota Supreme Court did not utilize the state constitution or laws to support its decision. This Court has

been careful to keep Miranda within its original bounds under the United States Constitution. See Fare v. Michael C., 442 U.S. 707 (1979); see also Oregon v. Elstad, supra; Colorado v. Spring, supra; Colorado v. Connelly, supra; Wyrick v. Fields, 459 U.S. 42 (1982); Fare v. Michael C., 439 U.S. 1310 (Rehnquist, J. in Chambers) (1978). The State should not be crippled in its law enforcement efforts by overly broad readings of Miranda and its progeny. Rather, this Court should accept certiorari in this case, and either permit full briefing and argument, or summarily reverse based on the clear precedent of Oregon v. Elstad, supra.

This is particularly so in light of Duckworth v. Eagan, no. 88-317, certiorari granted, 57 U.S.L.W. 3259 (October 11, 1988) presently pending for consideration by this Court. This case was argued March 29, 1989. 57 U.S.L.W. 3598 (March 14, 1989) (hearing

scheduled); see also 57 U.S.L.W. 3161 (September 20, 1988) (filed); 57 U.S.L.W. 3265 (October 11, 1988) (summary); 57 U.S.L.W. 3312 (November 1, 1988) (appointment of counsel). Eagan raises, in a somewhat different context, the same issue as presented in this case. In Eagan, a supposedly inadequate Miranda warning was given before the initial statement, but a constitutionally adequate Miranda warning was given before the second statement. The Seventh Circuit Court of Appeals remanded for consideration of admissibility of the second statement, while holding the first statement inadmissible. The State of Indiana and the Solicitor General asked this Court, in their briefs, to determine whether the second statement would be admissible, even if the initial Miranda warning was inadequate. This is the primary question raised by this petition. Should this Court determine in

Eagan that the second statement was admissible without a remand for further proceedings, that holding would clearly govern this petition. For this reason, the Court may wish to postpone consideration of this petition until after the Court rules in Eagan. If Eagan should clearly govern, it might be possible to dispose of this petition by reversing and remanding the case to the South Dakota Supreme Court for reconsideration in light of Eagan and Oregon v. Elstad, supra.

CONCLUSION

The South Dakota Supreme Court in this case decided an issue contrary to this Court's mandate in Oregon v. Elstad, supra. If the South Dakota Supreme Court would have applied Elstad, it would not have remanded the case to the habeas corpus court for reconsideration of the admissibility of subsequent statements made knowingly and

voluntarily and with the benefit of Miranda warnings.

Respondent believes that the South Dakota Supreme Court has totally failed to understand the distinction between an involuntary statement and a statement given without Miranda warnings. This Court has, however, made a clear distinction between the two. Elstad, supra at 307.

In addition, the decision below would deprive South Dakota law enforcement authorities and finders of fact of an entire class of otherwise highly probative and appropriate evidence. This Court is already considering a very similar issue in the case of Duckworth v. Eagan, supra. For these reasons, the Respondent respectfully prays that a writ of certiorari issue to review the decision of the South Dakota Supreme Court in

this matter, and that upon such review, the decision be reversed.

Dated this 4th day of April, 1989.

ROGER A. TELLINGHUISEN
ATTORNEY GENERAL
STATE OF SOUTH DAKOTA
Counsel of Record

CRAIG M. EICHSTADT
JANINE KERN
Assistant Attorneys General
Office of the Attorney General
State Capitol
Pierre, South Dakota 57501-509
(605) 773-3215

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
APR 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

88-1661

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RICHARD RIST, ACTING WARDEN
SOUTH DAKOTA STATE PENITENTIARY,

Petitioner,

v.

STEVEN SATTER,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF SOUTH DAKOTA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

ROGER A. TELLINGHUISEN
ATTORNEY GENERAL
State of South Dakota
Counsel of Record

Craig M. Eichstadt
Janine M. Kern
Assistant Attorneys General
State Capitol
Pierre, South Dakota 57501
Telephone: (605) 773-3215
Counsel for Petitioners

376 pp

APPENDIX

		PAGE
1.	South Dakota Supreme Court Decision on Rehearing (January 4, 1989)	A-1
2.	South Dakota Supreme Court Judgment on Rehearing (January 4, 1989)	A-36
3.	South Dakota Supreme Court Decision (April 20, 1988)	A-38
4.	South Dakota Supreme Court Judgment (April 20, 1988)	A-83
5.	South Dakota Circuit Court Memorandum Opinion (March 4, 1987)	A-85
6.	South Dakota Circuit Court Findings of Fact and Conclusions of Law (March 18, 1987)	A-105
7.	South Dakota Circuit Court Judgment (March 18, 1987)	A-111
8.	Application for Writ of Habeas Corpus (April 29, 1986)	A-113
9.	Writ of Habeas Corpus (July 30, 1986)	A-118
10.	Return to Writ (July 31, 1986)	A-120

11. South Dakota Circuit Court Judgment and Sentence (May 10, 1974) A-122

12. Voluntary Statement (April 11, 1973) A-126

13. Voluntary Statement (April 12, 1973) A-131

14. Excerpts from Trial Transcript (May 7-10, 1974) A-136

15. Excerpts from Habeas Corpus Transcript (September 10, 1986) A-276

16. Excerpts from Appellee's Brief (July 5, 1988) A-319

17. Excerpts from Respondent and Appellee's Petition for Rehearing (May 10, 1988) A-334

18. Excerpts from Appellee's Brief (July 8, 1987) A-350

19. Affidavits Regarding 1978 Escape (February 14, 1989) A-370

#15731-rev. & rem.-REM

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STEVEN SATTER, Petitioner and Appellant,

v.

HERMAN SOLEM, Respondent and Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
THIRD JUDICIAL CIRCUIT
CODINGTON COUNTY, SOUTH DAKOTA

HONORABLE IRVIN N. HOYT
Judge

JANINE KERN
Assistant Attorney General
Pierre, South Dakota

On the brief:
ROGER A. TELLINGHUISEN
ATTORNEY GENERAL
Pierre, South Dakota — Attorneys for Respondent and Appellee.

RICHARD BRAITHWAITE
Sioux Falls, South Dakota — Attorney for Petitioner and Appellant.

CONSIDERED ON REHEARING
August 29, 1988
OPINION FILE Jan. 4, 1989

MORGAN, Justice (on rehearing).

This case, before us on rehearing, is an appeal from the decision of the trial court (habeas court) denying habeas corpus relief of Steven Satter (Satter) from two convictions of murder. We reverse and remand.

The habeas court determined that Satter voluntarily and knowingly made certain admissions to Codington County Sheriff Berg (sheriff), notwithstanding the fact that he had not been given Miranda warnings, and that such inquiry was investigatory rather than accusatory. The original opinion, reversing the habeas court, was filed April 20, 1988, and is found at 422 N.W.2d 425 (S.D. 1988) (Satter I). In that decision, two Justices voted to reverse the habeas court on the grounds that Satter's statements to the sheriff at the April 2, 1973, interrogation should not have been admitted in evidence

because they were involuntary. Two Justices (hereinafter referred to as the dissent) held to the contrary and voted to affirm. One Justice joined in the reversal on the grounds that Satter had received ineffective assistance of counsel.

State's petition for rehearing was granted but limited to two issues, namely:

> (1) Whether [Satter's] statements to Sheriff Berg were voluntary and admissible; and
>
> (2) Whether [Satter] was denied effective assistance of counsel due to his trial counsel's failure to object to the admission into evidence of two exhibits.

After additional briefing and oral arguments, we determine that the first issue is dispositive and that Satter's statements to the sheriff were not voluntary and are therefore inadmissible. Presumably, the conduct of counsel complained of in the second issue will be avoided upon retrial.

We summarize the factual background as it relates only to the first issue. At all times pertinent, Satter was in custody in the Codington County Jail on burglary charges. He was questioned by law enforcement officers on several occasions regarding those burglaries and on each of those occasions Satter was fully advised of his Miranda rights in advance of questioning.

In the meantime, the sheriff's office was also investigating the disappearance of two local men. Late in the evening on April 1, 1973, the sheriff received an anonymous telephone tip on the location of the bodies of the missing men and the suggestion that Satter was connected. The next day, after an unsuccessful attempt at locating the bodies per the telephone information, the sheriff visited Satter in the jail. Without any attempt to Mirandize Satter, the sheriff first interrogated him

about some burglaries in the area. He then changed the line of interrogation by asking Satter if he knew anything about two bodies supposedly buried in the Watertown vicinity.*

The sheriff testified at trial that when first asked about the bodies, Satter posed a hypothetical question to the effect: If he had been paid to go out and destroy two bodies that are buried, what could he be charged with? The sheriff responded that he could possibly be charged with being an accessory. After some further conversation, Satter gave the sheriff detailed directions to find the location of the bodies. Next, Satter told the sheriff that some third person from Minneapolis named Deluci, who had

---

*Satter contends that the sheriff also told him that anything that Satter said would be confidential. When questioned at trial, the sheriff testified that he did not remember making such a promise.

apparently killed the two men offered him money to burn the bodies. Satter stated that he had not done so because of the smell of the bodies. The sheriff followed Satter's directions and recovered the bodies. The Division of Criminal Investigation was called in to assist in the investigation and Satter was properly advised of his Miranda rights before any further interrogation.

State has admitted at all stages of the appeal that the sheriff failed to give Satter any Miranda warning immediately prior to the commencement of interrogation on the date in question. State urges, however, that such a warning was unnecessary in this case. This position is based on four major premises. First, the sheriff's inquiry, at that point, was merely investigatory, not accusatorial, because he had no known crime and Satter was not a suspect. Secondly, Satter, who was not a stranger to the criminal justice system,

knew, understood and waived his Miranda rights, thus the failure to give him the warning was merely a technical omission. Thirdly, Satter's story about Deluci was a fabrication and there was nothing said incriminating Satter with the offense of murder. Lastly, there were no deliberately coercive or improper tactics used to warrant a presumption of compulsion.

With respect to the first premise, we pointed out in Satter I that the question was not whether the inquiry was investigatory or accusatory, but whether the interview was custodial. The record discloses that the interview in question was held in an office at the Watertown Police Department while Satter was in custody.

The Miranda Court stated:

> The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody

> at the station or otherwise deprived of his freedom of action in any significant way. (Emphasis added.)

Miranda v. Arizona, 384 U.S. 436, 477, 86 S.Ct. 1602, 1629, 16 L.Ed.2d 694, 725 (1966).

Custodial interrogation was again the background for the United States Supreme Court's decision in Edwards v. Arizona, 451 U.S. 477, 481-82, 101 S.Ct. 1880, 1883, 68 L.Ed.2d 378, 384 (1981), wherein the Court reaffirmed the language in Miranda which required that "custodial interrogation be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney." This was reiterated in Arizona v. Roberson, 486 U.S. ___, ___, 108 S.Ct. 2093, 2097, 100 L.Ed.2d 704, 712 (1988), wherein the court stated that a major purpose of Miranda "was 'to give concrete constitutional guidelines for law enforcement agencies and courts to follows.' 'As we have stressed on

numerous occasions, "[o]ne of the principal advantages" of Miranda is the ease and clarity of its application. . . .'" (Citations omitted.)

For the sake of argument, if we were to agree that the sheriff's initial inquiry was somehow protected from Miranda, we firmly believe that at the point where Satter proposed his hypothetical question the sheriff was on notice that Satter was or could be involved in some criminal activity. At that point, he should have immediately given Satter the requisite warning. The procedure is so simple that there is no excuses for not following it. We prefer to adhere to the bright line rule, rather than start caring exceptions.

The second premise is equally unimpressive. That premise is that Satter knew, understood and waived his Miranda rights; that he was not a stranger to the

criminal justice system and had been previously warned on some burglary interrogations. Therefore, it is argued, the failure to give the warning was only a technical omission.

In Miranda, we find the Court's reasoning that since it has always set high standards of proof for the waiver of constitutional rights and since the State establishes the circumstances under which the interrogation takes place, the heavy burden to demonstrate a waiver of the privilege against self-incrimination rightfully rests on the shoulders of the State. 384 U.S. at 475, 86 S.Ct. at 1628, 16 L.Ed.2d at 724. Neither the State nor the dissent in Satter I have cited any cases wherein the United States Supreme Court has upheld admission of any statements taken at custodial interrogation where such interrogation was

not commenced by the giving of the Miranda warning.

The suggestion that Satter's previous experience with the criminal justice system excuses the giving of any warning is rather unique. The State, and the dissent in Satter I, seem to suggest that there should be some sort of intelligence test. If the suspect has four previous convictions, he is sufficiently knowledgeable of his Miranda rights. But what if there are three convictions, two, or only one? Where do we draw the line? More importantly, where do the law enforcement authorities draw the line? They are the ones in the field. The creation of exceptions really does them no favor. Far better to adhere to the bright line rule. After all, it requires no great effort to take out the Miranda card, read the subject his rights, and ask the simple questions: Do

you understand your rights and do you waive them?

The third premise is to the effect that since Satter's response was a fabrication, he did not incriminate himself. If all that Satter had done was to tell the story about Deluci from Minneapolis, we would tend to agree. At least we would not find it sufficiently prejudicial to require reversal of the convictions. What is conveniently overlooked by the State and the dissent in this argument, is that the statements detailed the location of the bodies. To suggest that that information was not incriminating ignores reality. Satter's knowledge of the exact location of those bodies was the first direct evidence that linked him with the murders. Nothing else was done until after the bodies were recovered. No further interrogations were had, no attempt at lie detector tests was made, no

confession was made until after that information was acted upon. Absent those directions, the bodies might still be moldering in their grave under the rock pile. However, we need not speculate on that. In fact, Satter gave the sheriff the directions and implicated himself in the crime.

The final premises that we deal with is that there were no deliberately coercive or improper tactics used to warrant a presumption of compulsion. In other words, absent the use of the rubber hose, icy showers or marathon interrogations under bright lights, we should not presume that Satter's statements were involuntary.

In Oregon v. Elstad, 470 U.S. 298, 307, 105 S.Ct. 1285, 1292, 84 L.Ed.2d 222, 231 (1985), we find the following language:

> Failure to administer Miranda warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must

> nevertheless be excluded from evidence under Miranda. Thus, in the individual case, Miranda's preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm. (citations omitted.)
>
> But the Miranda presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted. Despite the fact that patently voluntary statements taken in violation of Miranda must be excluded from the prosecution's case, the presumption of coercion does not bar their use for impeachment purposes on cross-examination. (Cites omitted.) (Emphasis added.)

This passage completely negates the premise as applied in this case.

What then is the effect of these involuntary admissions on Satter's convictions in light of the "fruit of the poisonous tree doctrine" announced in Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963): Since the habeas court's ruling that the statements were voluntary did not require it to consider the

implications of involuntariness and the Wong Sun doctrine, we do not consider it appropriate for us to pass on this question. Rather, it is more appropriate that the habeas court consider this issue on remand.

We reverse and remand.

HENDERSON and SABERS, Justices, concur.

WUEST, Chief Justice, and MILLER, Justice, dissent.

MILLER, Justice (dissenting).

I dissent. In addition to the following, I hereby specifically incorporate my dissent in Satter v. Solem, 422 N.W.2d 425 (S.D. 1988) (Satter I).

I

Aside from a smattering of obligatory citations to a few decisions handed down by the United States Supreme Court, the majority relies solely upon the Court's decision in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). By so doing, the majority fails to consider or appreciate the Supreme Court's writings on the issue of custodial interrogations in the twenty-two years which have passed since Miranda was initially handed down. Most importantly, the majority completely misunderstands and

misapplies the Supreme Court's holding in Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), a decision which is directly on point with the case now before us.

In order to fully appreciate the applicability of Elstad to this case, it is necessary to recite some of the facts found therein. In December 1981, a home in Salem, Oregon, was burglarized. Missing were art objects and furnishings valued at $150,000. A witness to the burglary contacted the county sheriff's office implicating 18-year-old Michael Elstad in the burglary. Two officers then went to the home of Elstad's parents with a warrant for his arrest. The officers spoke with Elstad in his parents' living room concerning the burglary. One officer indicated that he felt that Elstad was involved in the burglary, and Elstad stated "Yes I was there." Elstad was

then escorted to the sheriff's office where he was later advised of his Miranda rights, which he waived. He then proceeded to give a full statement implicating himself and others in the crime. Elstad was charged and convicted of first-degree burglary. Elstad appealed, contending that his oral statement and signed confession should have been suppressed. The Oregon appellate court reversed, holding that his initial statement ("I was there") was inadmissible as having been given without the prescribed Miranda warnings, and that the later signed confession was also inadmissible due to the taint on Elstad's initial statement. The United States Supreme Court granted certiorari and held that the Fifth Amendment does not require the suppression of a confession made after proper Miranda warnings and a valid waiver of rights solely because

the police had obtained an earlier voluntary but unwarned admission from the suspect.

The similarities between Elstad and Satter are obvious. Like Michael Elstad, Steven Satter was not yet a suspect when he made his initial incriminating statement. Further, like Elstad, Satter initially incriminated himself without having been warned, and continued to incriminate himself after having received the Miranda warnings in interrogations conducted by a Division of Criminal Investigation (DCI) Agent four days and ten days after his initial unwarned statement. Finally, as in Elstad (where the police conceded that the questioning in Elstad's living room was custodial), Satter was in custody on a probation violation at the time he made his initial incriminating statement.

The majority in this case concludes that as a result of Satter's initial unwarned

statement, the "fruit of the poisonous tree" doctrine announced in Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), is somehow applicable. However, the Supreme Court in Elstad held that such is not necessarily the case. It stated that fundamental differences exist between the role of the Fourth Amendment exclusionary rule and the function of Miranda in guarding against prosecutorial use of compelled statements as prohibited by the Fifth Amendment. Elstad, 470 U.S. at 304, 105 S.Ct. at 1290, 84 L.Ed.2d at 228-29. See also New York v. Quarles, 467 U.S. 649, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984); Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974). It further noted that the failure to administer the Miranda warnings does not necessarily breed "the same consequences as police infringement of a constitutional right, so that evidence

uncovered following an unwarned statement must be suppressed as 'fruit of the poisonous tree.'" Elstad, 470 U.S. at 304, 105 S.Ct. at 1290, 84 L.Ed.2d at 229. The majority here "misconstrues the nature of the protections afforded by Miranda warnings and therefore misreads the consequences of police failure to supply them." Id.

The majority opinion states that the proper inquiry in determining whether Satter's statements are admissible is whether Satter's interview was custodial. Following that line of reasoning, the majority then determines that because the initial interview was custodial, any unwarned statements therein must be suppressed. However, as noted by the Supreme Court, the focus should not be upon whether the interrogation was custodial (as was conceded in Elstad) but rather whether the statement was coerced. "Absent some officially coerced

self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions." See Elstad, 470 U.S. at 305, 105 S.Ct. at 1291, 84 L.Ed.2d at 229 citing United States v. Washington, 431 U.S. 181, 187, 97 S.Ct. 1814, 1818, 52 L.Ed.2d 238, 245 (1977). Moreover, the Court noted that

> there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of Miranda, was voluntary. The relevant inquiry is whether, in fact, the second statement was also voluntarily made. As with any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements. (Emphasis added.)

Elstad, 470 U.S. at 318, 105 S.Ct. at 1297-98, 84 L.Ed.2d at 238 (footnote omitted).

There is no doubt that Satter, who was in jail on a probation violation, was indeed in custody at the time Sheriff Berg initially

made inquiry of him regarding the whereabouts of the two bodies. However, the question is not whether a suspect is in custody; rather, it is whether the suspect made his initial statement voluntarily. Voluntary statements remain a proper element in law enforcement. Miranda, 384 U.S. at 478, 86 S.Ct. at 1630, 16 L.Ed.2d at 726. Far from being prohibited by the Constitution, "admissions of guilt by wrongdoers, if not coerced, are inherently desirable." Elstad, 105 S.Ct. at 1291 quoting United States v. Washington, 431 U.S. 181, 187, 97 S.Ct. 1814, 1818, 52 L.Ed.2d 238, 245 (1977). Moreover, when neither the initial nor the subsequent admission of a suspect is coerced, "little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder." Elstad, 470 U.S. at 312, 107 S.Ct. at 1294-95, 84 L.Ed.2d at 234.

For the sake of argument, even if Satter's first statement was coerced, the Supreme Court has recognized that the coercive effect of a confession can be ameliorated. Even in such extreme cases as Lyons v. Oklahoma, 322 U.S. 596, 64 S.Ct. 1208, 88 L.Ed. 1481 (1944), in which police forced a full confession from the accused through unconscionable methods of interrogation, the Court has assumed that the coercive effect of the confession could, with time, be dissipated. See also Westover v. United States, 384 U.S. 496, 86 S.Ct. 1639, 16 L.Ed.2d 736 (1966) (a companion case to Miranda). Here, Satter had four days and later ten days between his unwarned statement to Sheriff Berg and his warned statements to Agent Petersen. If there was any coercion here, which I certainly do not concede, the passage of time dissipated its effect. Lyons, supra; Westover, supra.

The majority argues that there is little difference between the unwarned and noncoercive questioning which took place in this case and "the use of the rubber hose, icy showers, or marathon interrogations under bright lights." Nonsense!! There is "a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a 'guilty secret' freely given in response to an unwarned but noncoercive question[.]" Elstad, 470 U.S. at 312, 105 S.Ct. at 1295, 84 L.Ed.2d at 234. Justice Brennan, in his dissent to Elstad, mustered an entire "parade of horrors" as examples of confessions which were coerced by law enforcement through the use of torture, force or violence, contending that it is impossible to perceive any causal distinction between the facts in Elstad and

one involving a confession that was coerced by torture. The majority discounted Justice Brennan's contention as being "wholly unpersuasive." I agree.

Finally, I note, as did the Court in Elstad, that it is an unwarranted extension of Miranda to hold that a "simple failure to administer the [Miranda] warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period." Elstad, 470 U.S. at 309, 105 S.Ct. at 1293, 84 L.Ed.2d at 232. While Miranda requires that an unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made. As a result,

absent deliberately coercive or improper tactics in obtaining the initial statement (which certainly are not present here) the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of Miranda warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that preclude the admission of the earlier statement. See Elstad,470 U.S. at 314, 105 S.Ct. at 1296, 84 L.Ed.2d at 235.

The similarities between Elstad and Satter are most obvious. Therefore, the conclusion which we reach should be the same as that reached by the United States Supreme Court, namely Satter's written, warned statement should not be suppressed. Perhaps the majority can explain why, on one hand, it bases its holding on various cases decided by the United States Supreme Court and then

decides the ultimate issue in direct contradiction to that Court's latest holding on nearly an identical fact/law issue! Perhaps this issue may be ultimately resolved by the United States Supreme Court on a grant of certiorari.

II

Although not addressed by the majority, I must write on the issue of ineffective assistance of counsel because of Justice Sabers' dissent in Satter I. (I must assume that Justice Sabers agrees with my analysis under the first issue, since he stated in his prior dissent that "upon remand and retrial, the Issue I statements from the defendant should be excluded unless found to be clearly voluntary." Satter I, 422 N.W.2d at 430 (Sabers, J., concurring in result). The habeas court specifically found the statements to be voluntary and that finding is not clearly erroneous. See the authority

cited above and in my prior dissent, with which Justice Sabers did not take issue.)

Attorney Hackett's conduct in representing Satter did not descend to the level of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), establishes the two steps for determining ineffective assistance of counsel: (1) the defendant must show that counsel's performance was deficient and (2) the defendant must show that the deficient performance prejudiced the defense. Strickland also requires that a court must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. Further, the court must determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of

professionally competent assistance. Moreover, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in a particular case, and that there is a strong presumption that counsel had rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690, 104 S.Ct. at 2066, 80 L.Ed.2d at 695. This court has recognized that we will not second-guess a defense counsel's judgment if the acts complained of appear to be legitimate trial tactics. Jibben v. State, 343 N.W.2d 788 (S.D. 1984); State v. Tschida, 347 N.W.2d 338 (S.D. 1984).

Most of the concern surrounding the question of ineffective assistance of counsel relates to the introduction at trial of Exhibits 21 and 49, which were Satter's sworn

statements. Specifically, the statements noted that: "This statement is given with the understanding that a polygraph test will be offered to me at a future date. Also that the State will not contest or object to the polygraph test being offered as evidence in court."

By our standards, if there is any conceivable legitimate trial strategy in allowing the admission of the written statement, then the conviction must be upheld. See State v. Dornbusch, 384 N.W.2d 682 (S.D. 1986); State v. Anderson, 387 N.W.2d 544 (S.D. 1986).

As noted by the habeas court, attorney Hackett may have had several valid reasons for acquiescing in the admission of Satter's written statements without having excised that part of the statement referring to a polygraph test. As the habeas court noted, the statement was actually "a double-edged

sword." Satter had taken several polygraph examinations; some were passed and some were failed. Satter failed polygraph examinations dealing with the subject matter contained in his statement. However, Satter contended that he failed the polygraph dealing with the contents of his statement because of his mistaken belief as to the possible defense of self-defense. Satter did, however, pass a polygraph examination concerning a homicide in western South Dakota and another polygraph concerning some burglaries. As noted by the habeas court, attorney Hackett, on cross-examination, secured a surprising admission from DCI Agent Petersen to the effect that Petersen believed Satter's statement to be the truth. Further, Satter testified that his statement was the truth. Thus, since Petersen and Satter had both contended that Satter's statement was the truth, and since there was no testimony that

Satter had failed a polygraph examination concerning his statement. the jury could deduce that the statement was in fact true. This is the converse of Satter's proposition that the portion of his statement relative to a polygraph examination would indicate to the jury that Satter had failed another polygraph due to the lack of testimony on that subject. The habeas court noted:

> [W]hat Attorney Hackett was able to do in effect was to have one of the State's chief witnesses, Delbert Petersen DCI Agent, corroborate the veracity of Exhibit 21 [Satter's statement]. It is my opinion that Hackett's actions regarding Satter's written statements were part of a legitimate trial tactic. Satter's allegations are not sufficient to overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, or in other words, does not constitute action which might not be considered solid trial strategy. (Emphasis added.)

It should also be noted that an interesting colloquy between attorney Hackett, Satter and the court took place in

chambers at the close of Satter's original trial. When asked if Satter had participated in the trial of his case in connection with picking the jury, Satter replied "Yes." Further, Satter approved the jury as it was selected, and admitted to having been consulted throughout the trial concerning questions and decisions that were made. When asked by the court whether he felt "that your attorney has done a tremendous job for you," Satter replied "Yes I do."

Finally, it should be noted that at the time of the original trial attorney Hackett was a highly respected trial lawyer, having practiced for thirty years. He was known as a tenacious advocate with a wealth of trial experience. I observe, with a great deal of concern, that Satter now complains of Hackett's strategy and performance some thirteen years after trial and years after Hackett has died. Memories have faded

concerning the actual occurrence of events which culminated in Satter's conviction and Hackett is not here to defend his performance. Trying to establish whether Hackett's actions constituted ineffective assistance is greatly hindered by his death, leaving us with nothing but a cold record and the testimony of others (including Satter himself, who has a vested interest in tarnishing Hackett's performance) by which to determine the legitimacy of his tactics. As stated earlier, given the state of the record as it exists, I am convinced that Hackett's performance did not fall below that which was required of him as an attorney at law. Any assertion to the contrary simply is not supported by the record.

I would affirm the circuit court.

I am authorized to state that Chief Justice Wuest joins in this dissent.

IN THE SUPREME COURT)
SS January 4, 1989
State of South Dakota)

Present: Chief Justice George W. Wuest and Justices Robert E. Morgan, Frank E. Henderson, Richard W. Sabers and Robert A. Miller.

STEVEN SATTER,	) Supreme Court
	) State of South Dakota
Petitioner and Appellant,	) Filed: Jan. 4, 1989
	)
v.	)
	)
HERMAN SOLEM,	)
	)
Respondent.	)

This Cause coming on to be heard on November 17, 1987, and reheard on August 29, 1988, at a term of this Court at the Supreme Court Courtroom in the City of Pierre, State of South Dakota, upon the merits of the cause and upon oral argument of counsel, and the Court having advised thereon and filed its decision in writing, now, therefore,

IT IS CONSIDERED, ORDERED AND ADJUDGED that the Judgment of the Circuit Court, within and for Codington County, appealed

from herein, be and the same is hereb reversed,

AND IT IS FURTHER ORDERED that thi cause be and it is hereby remanded to sai Circuit Court for further proceeding according to law and the decision of this Court.

AND IT IS FURTHER ORDERED AND ADJUDGE that no costs be taxed.

BY THE COURT:

/s/ George W. Wuest

Chief Justice

ATTEST:

/s/ Gloria J. Engel

Clerk of the Supreme Court

(SEAL)

(THIS JUDGMENT SUPERSEDES AND REPLACES THE JUDGMENT DATED APRIL 10, 1988.)

A-38

#15731-rev. & rem.-REM

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STEVEN SATTER, Petitioner and Appellant,

v.

HERMAN SOLEM, Respondent and Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
THIRD JUDICIAL CIRCUIT
CODINGTON COUNTY, SOUTH DAKOTA

HONORABLE IRVIN N. HOYT
Judge

RICHARD BRAITHWAITE Attorney for Petitioner
Sioux Falls, South Dakota and Appellant.

JANINE KERN
Assistant Attorney General
Pierre, South Dakota

On the brief:
ROGER A. TELLINGHUISEN
ATTORNEY GENERAL Attorneys for Respondent
Pierre, South Dakota and Appellee.

ARGUED November 17, 1987
OPINION FILE April 20, 1988

BEST AVAILABLE COPY

MORGAN, Justice.

Petitioner and appellant Steven Satter (Satter or petitioner), appeals from a judgment denying habeas corpus relief. We reverse and remand.

Satter was convicted by jury trial of two counts of murder on May 10, 1974, and was sentenced to serve two concurrent life sentences. Satter appealed that conviction, which was affirmed at 242 N.W.2d 149 (S.D. 1976). Petitioner raises four issues on appeal.

(1) That admissions made to the sheriff without benefit of Miranda warnings were involuntary.

(2) That jury instruction No. 15 impermissibly shifted the burden of proving self-defense to the accused.

(3) That he received ineffective assistance of counsel.

(4) Satter, pro se, raises the issue of ineffective assistance of counsel, contending that Jury Instruction No. 5 was flawed because it did not contain all the elements of murder.

While incarcerated in the Codington County Jail because of probation violations involving area burglaries, without having given Satter Miranda warnings, petitioner was questioned by Codington County Sheriff Berg (Berg), concerning an anonymous phone tip Berg had received about the location of two bodies. Satter told the sheriff he knew about the bodies because the person who had murdered them had asked him to dispose of the bodies. He volunteered the name of the alleged murderer and the location of the bodies after, according to Satter, Berg promised their conversation was off the record. This conversation was never reduced to writing. At the habeas hearing, the sheriff did not recall having made such a promise. Prior to this interview with Berg, Satter had been interviewed on numerous occasions concerning local and out-of-state

burglaries and had been Mirandized prior to each interview.

Following Satter's directions, the bodies were located and a DCI investigator was called in. Satter was given Miranda warnings at each interview thereafter. Satter agreed to a polygraph examination dealing specifically with the murders. Up to this point in time, he had not admitted committing the murders. Satter was Mirandized prior to the polygraph examination and before a post-polygraph examination interview. Satter failed the polygraph and thereafter confessed to the murder of two acquaintances, but maintained his actions were in self-defense. His confession was consistent with that theory. The written confession signed by Satter contained a paragraph offering Satter a future polygraph and a promise that the State would not object to its introduction into evidence at trial.

No further polygraphs concerning the murders were offered or given. Additional facts concerning the trial will be given as needed.

We first set forth the scope of our review. Since the remedy sought is in the nature of a collateral attack upon a final judgment, the scope of review is limited. Goodroad v. Solem, 405 N.W.2d 141 (S.D. 1987); Everitt v. Solem, 412 N.W.2d 119 (S.D. 1987); SDCL 21-27-16.

> '. . . [H]abeas corpus can be used only to review (1) whether the court had jurisdiction of the crime and the person of the defendant; (2) whether the sentence was authorized by law; and (3) in certain cases, whether an incarcerated defendant has been deprived of basic constitutional rights.'

Goodroad, 406 N.W.2d at 144 quoting State ex rel Burns v. Erickson, 80 S.D. 639, 645, 129 N.W.2d 712 [sic] 715 (1964). See Goodroad, supra, for a general review of the habeas corpus remedy. We recognized in State ex rel Poach v. Sly, 63 S.D. 162, 257 N.W. 113

(1934), that a constitutional violation in a criminal case may deprive the trial court of jurisdiction. See, Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). '"Further, we must bear in mind that in cases such as this, the burden of proof is upon the [petitioner]."' Goodroad at 145 citing Spirit Track v. State, 272 N.W.2d 803, 804 (S.D. 1978).

Petitioner first contends that his admissions "to Sheriff Berg were inadmissible because they were involuntary." Petitioner bases involuntariness on three grounds. First, a violation of his privilege against self-incrimination under the Fifth Amendment of the United States Constitution and Article VI, Section 9, of the South Dakota Constitution and Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d694 (1966). Second, Satter had earlier and repeatedly informed authorities that he was seeking to

retain counsel, but none was made available to him during subsequent interview. Third, that there was overreaching by authorities in the form of promised confidentiality concerning the admissions which were later used against him at trial.

The habeas court found that Satter volunatarily and knowingly made admissions to Sheriff Berg, notwithstanding the fact that he had not been given Miranda warnings, and that such inquiry was investigatory rather than accusatory. We may not upset the circuit court's factual findings unless they are clearly erroneous. SDCL 15-6-52(a); Goodroad, supra; Spirit Track, supra; Cunningham v. Yankton Clinic, P.A., 262 N.W.2d 508 (S.D. 1978).

In Oregon v. Elstad, 470 U.S. 298, 307, 105 S.Ct. 1285,1292, 84 L.Ed.2d 222, 231 (1985), the court held that "[f]ailure to administer Miranda warnings creates a

presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth amendment must nevertheless be excluded from evidence under Miranda." State v. Holland, 346 N.W.2d 302 (S.D. 1984); Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).[1] State admits that the Petitioner did not receive warnings at this interview, but contends that he had been given warnings on several occasions prior to this interview. Sheriff Berg testified at trial that at this interview he "talked to Steve Satter reference to a number of

---

[1]The threshold question raised by Miranda is not whether the inquiry was investigatory rather than accusatory, but whether the interview was custodial. It was admitted at trial that petitioner was incarcerated at that time. Under similar circumstances in Hollard, the State conceded that jail interviews were custodial interrogations.

burglaries that him and another fellow had been involved in. We talked about this for awhile, and at that time I asked him if he knew anything about two bodies that were supposed to be buried somewhere around the Watertown area." The dissent suggests there was no crime under investigation when Berg questioned Satter. However, it is clear from the testimony of both Sheriff Berg and Officer DeWall that law enforcement agencies were aware of the disappearance of the deceased individuals. Law enforcement officials had already began looking for two persons, or their bodies, when Berg received the anonymous phone call suggesting where the bodies could be found, and if not found, that Berg should talk to Satter.

In Holland, a strikingly similar situation, the Defendant was in custody in an Oregon jail facing child abuse charges while at the same time there were second-degree

murder and manslaughter charges pending in South Dakota. An Oregon official interviewed the Defendant and read him his Miranda warnings concerning the Oregon charges. Defendant waived his constitutional rights with regard to the Oregon charges because he considered those to be ridiculous. Not long into the interview, the official abruptly and without warning changed the focus of the questioning from the Oregon charge to the South Dakota incident. We said in Holland:

> Under the circumstances of the abrupt change in focus of the interview, we find no voluntary or intelligent waiver by defendant of his rights. The record is clear that defendant waived his right to an attorney only for purposes of discussing the Oregon charges. When he waived his rights at that time, he never knew that the South Dakota incident would be raised. It is difficult to conceive how one can intelligently waive his right to counsel when he does not know the nature of the offense with which the major part of the interview will be concerned.

346 N.W.2df [sic] at 306. We held in Holland, that the State failed to meet the

heavy burden of showing an intelligent and knowing waiver of rights. We do not find the facts in this case to be dissimilar from Holland, and therefore hold that the prior Miranda warnings, not ever related to the same interview, were not sufficient to advise defendant of his rights with regard to the murder charges. Thus, the admissions made to Sheriff Berg were involuntary and any evidence resulting therefrom could be subject to the Fruit of the Poisonous Tree doctrine. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). We reverse the habeas court on this issue and remand for entry of judgment consistent with this opinion.

Because we reverse and remand on the issue of failure to properly Mirandize, we need not discuss the issues of request for counsel and of promised confidentiality. Nor need we discuss generally the issue of

ineffective assistance of counsel. However, because the issue of the propriety of Instructions No., 5 and 15 may well come up on retrial, we deem it expedient to review them at this time in hopes of forestalling any issue on those instructions if given on retrial.

Petitioner argues, through counsel and pro se, that the two instructions were fatally flawed. Although, in a habeas corpus appeal, under our scope of review we will not ordinarily review jury instructions, we may review whether, under similar circumstances, a reasonably competent attorney exercising customary skills and diligent, would have objected so as to determine whether counsel's performance falls within the wide range of

professional assistance required by the Sixth Amendment.[2]

Instruction No. 15, as given by the court, states:

INSTRUCTION NO. 15

> It is not required that the defendant shall produce a preponderance of the evidence in providing circumstances that justify the killings on his part, or that he prove such circumstances of justification to your satisfaction beyond a reasonable doubt. If, after consideration of the evidence, if any, touching the circumstances or question of justification on the part of the

---

[2] "'First, . . . that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, . . . that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose reslt is reliable.'"

Woods v. Solem, 405 N.W.2d 59, 61 (S.D. 1987) (quoting Strickland v. Washington, 466 U.S. 668,687, 104 S.Ct. 2052,2064, 80 L.Ed.2d 674,693 (1984)).

> defendant for the shooting of the decedents, together with all of the other evidence in the case, you may have reasonable doubt as to whether the defendant did the shooting in the lawful defense of himself, when there was reasonable ground on his part to believe or to apprehend a design on the part of the decedents to him great bodily injury, and that there was imminent danger of such design being accomplished, you should acquit the defendant.

Petitioner argues that the instruction impermissibly shifts the burden of proving self-defense to defendant, thus denying him due process of law.

"'[A] State must prove every ingredient of an offense beyond reasonable doubt and . . . may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense.'" Francis v. Franklin, 471 U.S. 307,314, 105 S.Ct. 1965, 1971, 85 L.Ed.2d 344, 353 (1985) (quoting Patterson v. New York, 432 U.S. 197, 215, 97 S.Ct. 2319, 2329, 53 L.Ed.2d 281, 295 (1977). "A permissive

inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." Franklin, 471 U.S. at 314, 105 S.Ct. at 1971, 85 L.Ed.2d at 353-54. A permissive inference, unlike a mandatory presumption, suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion. Franklin, supra.

State contends that the instruction is a correct statement of the law. We agree. We believe the meaning, when considered with the other instructions, becomes clear. we approved an instruction using virtually identical language in State v. Wilcox, 48 S.D. 289, 204, N.W. 369 (1925), and therein we stated:

> While it is incumbent upon the defendant to show justification where his defense is 'self-defense,' this does not mean

> that he must prove his defense beyond a reasonable doubt, but only that his evidence must be sufficient to create or leave in the minds of the jury a reasonable doubt as to whether he was justified, in taking the life of the deceased. (Emphasis added.)

48 S.D. at 297, 204 N.W. at 372. The language "leave in the minds of the jury a reasonable doubt" is another way of saying the defendant has the burden of persuasion when he raises an affirmative defense. This does not relieve the State of its burden of proving beyond a reasonable doubt that the justification was unwarranted.

The trial court's Instruction No. 5 stated:

INSTRUCTION NO. 5

> The essential elements of murder, the offense as charge din the information, each of which the State must rpove beyond a reasonable doubt, are:
>
> 1. That the defendant at the time and placae alelged in the information inflicted an injury or injuries upon the deceased from which the deceased died.

2. that such injury or injuries were caused by an act of the defendant imminently dangerous to others and evincing a depraved mind and without regard for humand life.

Satter, pro se, alleges that the instructionw as deficient in that it did not contain the third element of hte offense: "That the killing was without authority of law and without justification." When a defendant raises the affirmative defense of self-defense, it is incumbent upon the State to prove beyond a reasonable doubt that the killing was without authority of law. We might say that, in view of the other instructions given, particularly No. 15, it is harmless error. Since the case is being remanded, we suggest that the proper instruction be given in the event of retrial.

We reverse the judgment of the habeas court and remand with instructions to enter a writ with instructions to the State to either

retry the petitioner within a reasonable time or discharge him.

HENDERSON, Justice, concurs.

SABERS, Justice, concers in reslt.

WUEST, Chief Justice, and MILLER, Justice, dissent.

SABERS, Justice (concurring in result).

I agree with Justice Morgan that this case requires reversal and remand for new trial. However, I am convinced that the basis for reversal should be Issue III, not Issue I.

Defense counsel's conduct constituted ineffective assistance of counsel under the state and federal constitutions. Defense counsel should have objected to exhibits 21 and 49 because they contained highly incriminating material. Even if we accept the State's argument that counsel did not object because it was part of the trial strategy, no reasonably competent counsel would conclude that inclusion of the paragraph concerning the polygraph test would be helpful.

Assuming there is some defense strategy for allowing the jury to see portions of the statement, there is no conceivable reason the

defense would want the jury to see the following paragraph:

> "This statement is given with the understanding that a polygraph will be offered to me at a future date. Also that the State will not contest or object to the polygraph test being offered as evidence in court."

The jury could draw only one inference from that paragraph. As stated by present defense counsel, the only inference the jury could draw was:

> Satter claims he killed in self defense; since he didn't object to Exhibit #21, the state must have kept its promise and given him a polygraph; he could offer the test results without objection from the state; if he passed the exam he certainly would want us to know it; he didn't offer polygraph test results; ergo - he failed the polygraph and his testimony concerning self defense is not true.

"That's dynamite. Even if there were some legitimate trial strategy in having the jury see the bulk of Exhibit #21, any reasonably competent counsel would have asked to have

the quoted paragraph excised - and that request would have been granted."

The effect of the polygraph paragraph was dynamite. It effectively destroyed the defendant's defense of self-defense. It constitutes ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 104 Sup.Ct. (sic) 2052, 80 L.Ed.2d 674 (1984), and requires reversal, remand, and retrial. Upon remand and retrial, the Issues I statements from the defendant should be excluded unless found to be voluntary.

MILLER, Justice (dissenting).

I dissent.[3] Since I am convinced that the trial court findings were not clearly erroneous and not affected by any error of law, I am of the opinion that the judgment denying habeas corpus relief should be affirmed for the following reasons (their order does not reflect their relative merit ranking):

(1) The Miranda warning was not necessary.

At the time Sheriff Berg questioned Satter there was no known crime and Satter was not a suspect. Sheriff Berg was at the investigatory (not the accusatorial) stage of the proceedings. (Remember too, that there is no claim or evidence of police misconduct or coercion.)

---

[3] I do agree with the majority's analysis regarding Instructions 5 and 15.

A suspect has a right to counsel at any custodial interrogation. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) reh'g denied, 452 U.S. 973, 101 S.Ct. 3128, 69 L.Ed.2d 984 (1981). In United States v. Gay, 774 F.2d 368 (10th Cir. 1985), the court stated that "interrogation" for purposes of determining whether Miranda warnings are required, "is best viewed as an umbrella term encompassing words or actions that police should know are reasonably likely to elicit an incriminating response." Id. at 379. See also United States v. Gonzalez-Mares, 752 F.2d 1485 (9th Cir. 1985), cert. denied, 473 U.S. 913, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985), providing that not every question posed in a custodial setting is equivalent to interrogation requiring Miranda warning.

The facts here indicate that Sheriff Berg had received an anonymous phone call

advising him that there were bodies in a rock pile south of the town of Kranzburg, South Dakota. The caller told Sheriff Berg that if he could not find the bodies himself he should talk to Satter, who was then being held in jail on burglary charges. The caller indicated nothing further. Sheriff Berg searched the general area described by the caller, but was unable to find anything. He then went to the jail and talked to Satter about some burglaries that Satter and another man had allegedly committed. He then asked Satter "if he knew anything about two bodies that were supposed to be buried somewhere around the Watertown area."

In the circumstances of this case, Sheriff Berg was not required to give a Miranda warning. His inquiry regarding the location of alleged dead bodies was not accusatory and could not generally be said to lead to incriminating responses, and thus

Sheriff Berg's question did not constitute "interrogation" invoking Satter's Miranda rights. Gay, supra. I also note and distinguish that the defendants in both Elstad, infra and Holland, infra, (cases heavily relied upon by the majority) were suspects and/or charged with a crime for which they were being interrogated. Whereas here, Satter was not even a suspect for any crime concerning the bodies. See also (8)(a) of this dissent.

(2) Satter knew, understood and waived his Miranda rights.

First, nowhere does Satter claim that at the time he gave the statement to Sheriff Berg he was not aware of his Miranda rights. Rather, he urges the technical omission of the exercise of giving the warning on April 1, 1973.

The determination of whether an "accused" has knowingly and voluntarily

waived his Miranda rights depends on the facts of each case. Stumes v. Solem, 752 F.2d 317 (8th Cir. 1985), cert. denied, 471 U.S. 1067, 105 S.Ct. 2145, 85 L.Ed.2d 501 (1985) citing Fare v. Michael C., 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979). Although not referred to in the majority opinion, we set forth the test for waiver in State v. Holland, 346 N.W.2d 302, 305 (S.D. 1984), stating:

> A defendant can waive his privilege against self-incrimination and the rights that go along with it, provided that the waiver is made voluntarily, knowingly and intelligently. Miranda, supra. To determine whether the waiver was made voluntarily, knowingly, and intelligently, we must look to the particular facts and circumstances surrounding the case, including the background experience, and conduct of the accused. (citations omitted) We must also consider whether the defendant knew of the nature of the offense for which he was charged or suspected. . . .

See also State v. Albright, 418 N.W.2d 292 (S.D. 1988); Stumes, supra.

Satter was no stranger to the criminal justice system. He had been convicted of four prior felonies. More importantly, however, at the time he gave the statement to Sheriff Berg he was in custody regarding burglary charges and probation violation (possession of a firearm) and had previously been Mirandized regarding those charges. In fact, he had met many times with law enforcement officers during March and was Mirandized before each interview. Satter's trial testimony reveals that he was articulate and intelligent. He clearly was aware of his right to remain silent, his right to counsel, etc. as regarded by Miranda.

Sheriff Berg did not know if any dead bodies existed. Satter clearly was unaware of any murder charge at the time he talked to the sheriff. Certainly Satter was not suspected of, nor charged with, any criminal

offense relating to the bodies at that time. More importantly, in Colorado v. Spring, 479 U.S. ___, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987), the United States Supreme Court held that a suspect's awareness of all the crimes about which he could be questioned was irrelevant in determining the validity of the decision to waive the Fifth Amendment privilege against self-incrimination and, therefore, the failure to inform the defendant of the subject matter of an interrogation could not have affected his decision to waive the privilege.

For the above reasons, and all of the other reasons included herein,[4] it is not clearly erroneous for the trial court to conclude, after scrutinizing the totality of

---

[4]Specifically note the Fifth and Sixth Amendment right to counsel issues under (8)(a) of this dissent.

the circumstances, that Satter waived his Fifth Amendment rights, as the statements were voluntarily, knowingly and intelligently made. State v. Bult, 351 N.W.2d 731 (S.D. 1984); Holland, supra; Stumes, supra.

(3) The story Satter gave Sheriff Berg was an untrue fabrication.

Satter did not give Sheriff Berg a statement implicating himself with the killings. Rather, he advised Sheriff Berg that a named individual from Minnesota had come to Watertown to collect a percentage of proceeds from some burglaries that had been committed by two other individuals, and had shot these two men after he learned that they had spent his share of the money. Satter advised Sheriff Berg that this individual offered him $1,000 to go out and burn up the two bodies with a cutting torch, but he

indicated he could not bring himself to do so.

As stated earlier, nothing about that statement incriminated the defendant with the offense of murder, thereby eroding any fruit of the poisonous tree concepts. See generally, Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985).

(4) After being Mirandized, Satter latter told the same fabricated story to a DCI agent.

Sheriff Berg contacted other law enforcement authorities after the bodies were located. DCI Agent Delbert Peterson (Peterson) went to Watertown, advised Satter of his Miranda rights and was told a similar fabrication concerning an offer by persons from Minneapolis to dispose of the bodies.

First, I disagree with the majority's analysis of Elstad, supra. The majority quotes from Elstad as follows:

> Failure to administer Miranda warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under Miranda.

470 U.S. at 307, 105 S.Ct. at 1292, 84 L.Ed.2d at 231.

The majority, however, overlooks or disregards other significant language in Elstad, holding that only compelled testimony is prohibited for the State's case-in-chief. The Court stated:

> Though Miranda requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn . . . solely on whether it is knowingly and voluntarily made.

470 U.S. at 309, 105 S.Ct. at 1293, 84 L.Ed.2d at 232.

> We must conclude that, absent deliberately coercive or improper

> tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of Miranda warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice to waive or invoke his rights.

470 S.Ct. at 314, 105 S.Ct. at 1296, 84 L.Ed.2d at 235.

Here, Satter was Mirandized many times regularly throughout March, 1973, and before the April 1 statement to Sheriff Berg. Satter was "an old hand" with the criminal justice system. He had visited with an attorney several times in March, 1973, but did not retain one. As stated earlier herein, Satter's trial testimony reveals that he was articulate and intelligent. Finally, after Satter posed the hypothetical question about the dead bodies to Sheriff Berg and was

informed that if he had knowledge of their location he could be charged with some criminal offense, he later voluntarily returned to the subject of the location of the bodies after his discussion with Berg had turned to other topics. Thus, Satter was sufficiently warned before giving the April 1 statement and his rights were voluntarily waived and the same rationale applies to the statement to Peterson.

Furthermore, there has been no showing of police coercion. There is nothing in the record indicating any police misconduct or coercive tactics at the April 1, interview or at any other time. Neither Sheriff Berg nor Peterson employed physical or emotional pressure to elicit the statement from Satter. Nor was Satter worn down by improper interrogation tactics, lengthy questioning, trickery, or deceit. See Colorado v. Spring, supra; Elstad, supra. (See Colorado v.

Connelly, 479 U.S. ___, ___, 107 S.Ct. 515, 523, 93 L.Ed.2d 473, 486 (1986), wherein it is stated that "[t]he sole concern of the Fifth Amendment, on which Miranda [is] based, is governmental coercion.") Therefore, any presumption of coercion was rebutted by State.

The giving of Satter's subsequent statement to Peterson, after appropriate Miranda advice (and the subsequent written Mirandized confessions), also supports the voluntary nature of Satter's statements. Elstad, 470 U.S. at 318, 105 S.Ct. at 1298, 84 L.Ed.2d at 238. Thus, to require a retrial simply by excluding the same statement previously given to Sheriff Berg would be an idle act.

Even if the April 1 statement would be inadmissible under Elstad, which I certainly do not concede, the admission in State's case-in-chief was harmless error due to

Satter's subsequent statement to Peterson and confessions, which were voluntarily given after valid Miranda warnings. Albright, supra. (See discussion below.)

(5) The subsequent statements and confessions were not fruit of any poisonous tree.

I also disagree with majority's statement on page 5, stating: ". . . the admissions made to Sheriff Berg were involuntary and any evidence resulting therefrom could be subject to the Fruit of the Poisonous Tree Doctrine."

First, the trial court's finding of voluntariness and waiver, as stated earlier herein, is not clearly erroneous. Subsequent to the statements to Sheriff Berg and Peterson, Satter executed Mirandized written admissions of killing the victims. These subsequent statements and "Confession[s]

cannot be 'fruit of the poisonous tree' because the tree itself [was] not poisonous." Colorado v. Spring, 479 U.S. at ___, 107 S.Ct. at 856, 93 L.Ed.2d at 964.

The majority overlooks or disregards the holding in Elstad, 470 U.S. at 309, 105 S.Ct. at 1293, 84 L.Ed.2d at ___, in which the United States Supreme Court said:

> It is an unwarranted extension of Miranda to hold that a simple failure to administer the warnings, unaccompanied by an actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though Miranda requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn . . . solely on whether it is knowingly and voluntarily made. (Emphasis added.)

Since there is no doubt that the subsequent statement (to Peterson) and the written confessions were voluntarily made and appropriately allowed into evidence, the admission of the April 1 statements during

the State's case-in-chief was, at worst, harmless error. "No further purpose is served by imputing 'taint' to subsequent statements obtained pursuant to a voluntary and knowing waiver." 470 U.S. at 318, 105 S.Ct. at 1298, 84 L.Ed.2d at 238. (See discussion in 8(b) of this dissent regarding alleged promise of confidentiality for the subsequent statements.) Finally, as Elstad noted, the subsequent confessions could have been utilized for impeachment purposes on cross-examination. See also State v. Williamson, 349 N.W.2d 645 (S.D. 1984).

Therefore, the subsequent statements were not involuntary nor were they "fruit" of any "poisonous tree" under the clear holding of Elstad, supra. See also, Colorado v. Spring, supra.

(6) Satter did not confess to the killing until he failed the polygraph examination.

During the course of the investigation, Satter was Mirandized approximately twenty times. He ultimately took a polygraph examination, which he failed. It was not until then that he admitted to killing the victims, asserting that he did so in self-defense. No statements prior to that time in any manner implicated him in the killing of the victims, but rather implicated him in other possible charges.

(7) Self-defense was the real issue.

Throughout the trial, Satter asserted that he shot the victims in self-defense after an argument. He and the victims had committed a number of burglaries together in South Dakota and Minnesota. Satter was angry with them because one of the victims had taken some nude pictures of Satter's sister. At no time did Satter assert that he did not shoot the victims, rather he claimed that he did so in self-defense. The jury heard all

of the facts and concluded that he had committed murder. State v. Albright, supra.

(8) Other issues should be addressed.

Because of its holding on one issue, the majority did not discuss the other issues which were raised by Satter. In my view we should discuss and dismiss those issues as not meritorious.

(a) Request for Counsel

Satter knew and understood his right to counsel and was negotiating with private counsel to represent him. At no time did he request to have an attorney with him when Sheriff Berg talked to him, even though it seems clear from the record that he understood his right. In my view, he waived his right to counsel. Stumes, supra. Furthermore, the admission of statements made by a criminal suspect before any formal charges or indictment has been

issued does not violate the suspect's Sixth Amendment right to counsel because that right has not yet attached. See generally Maine v. Moulton, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985) ("Incriminating statements pertaining to other crimes, as to which the Sixth Amendment has not yet attached are, of course, admissible at the trial of those offenses." 474 U.S. at 181, 106 S.Ct. at 490, 88 L.Ed.2d 499 fn. 16). Regarding a Fifth Amendment right to counsel, see Espinoza v. Fairman, 813 F.2d 117 (7th Cir. 1987), cert. denied, Fairman v. Espinoza, ___ U.S. ___, 107 S.Ct. 3240, __ L.Ed.2d ___ (1987). As stated earlier in this dissent, Satter waived his Fifth Amendment right to

counsel on the burglary charges.[5] It is not a requirement to re-Mirandize for a different crime after securing a valid waiver on earlier charges. Espinoza, supra, citing Colorado v. Spring, supra.

(b) Promised Confidentiality

Satter principally asserts that Sheriff Berg had promised that their conversation regarding the dead bodies would be confidential. Sheriff Berg did not recall having made any such assurance. The trial court resolved that conflict in favor of the State, and

---

[5]The facts here are distinguishable from Holland wherein defendant, who was in an Oregon jail on Oregon charges, had retained South Dakota counsel for the South Dakota charge. Here, Satter had not retained counsel and waived his right, nor had any formal murder charges been filed. See Edwards v. Arizona, supra; Espinoza, supra citing Colorado v. Spring, supra.

in my view such holding was not clearly erroneous. Albright, supra.

(c) Ineffective Assistance of Counsel

After having reviewed the transcript of the habeas corpus hearing and the trial, I am convinced that Satter was not represented by ineffective counsel. Unfortunately, Attorney Hackett is no longer living to defend himself. In my view, he did a laudable job of representing Satter at trial and on appeal. I believe Satter's assertions of ineffective assistance of counsel totally lack merit. The United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), set forth the standard to employ when examining an ineffective assistance claim. A defendant claiming such must show

> that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693.

Satter's principal argument is that Hackett failed to move to suppress the statements and confessions. Hackett did object at trial to the statement but used the confession to support the self-defense claim. This offer of Satter's written statements was a part of Satter's and Hackett's legitimate trial tactics and strategy to show that Satter killed in self-defense. It is not this court's function to

second-guess the tactical decisions of counsel nor to substitute its own theory of defense. Jibben v. State, 343 N.W.2d 788 (S.D. 1984).

Satter also argues that Hackett was deficient because he did not seek to excise a portion of his written confession which referred to another polygraph examination. First, we have no way to determine what, if any, impact that portion of the statement had upon the jury. Further, its admission clearly seems to coincide with the totality of Satter's and Hackett's overall strategy. Even if Hackett erred in failing to make such a motion, I am convinced that the oversight did not rise to the Strickland standards. As stated earlier, the total issue was self-defense and the jury simply did not buy it.

I conclude that Attorney Hackett's representation was anything but casual. Hackett raised proper objections, vigorously presented the self-defense claim and preserved all meritorious issues.

I conclude by asserting that it would be a manifest injustice to require a retrial of this case. The defendant, after being properly advised of his rights, admitted to the shootings yet claimed that he did so in self-defense. Now after his attorney has died, he attempts to collaterally attack the conviction on a number of grounds which in my view are not meritorious.

The judgment denying habeas corpus relief should be affirmed.

I am authorized to state that Chief Justice Wuest joins in this dissent.

IN THE SUPREME COURT)
SS April 20, 1988
State of South Dakota)

Present: Chief Justice George W. Wuest and Justices Robert E. Morgan, Frank E. Henderson, Richard W. Sabers and Robert A. Miller.

STEVEN SATTER,	) Supreme Court
	) State of South Dakota
Petitioner and Appellant,	) Filed: Apr. 20, 1988
	)
v.	)
	)
HERMAN SOLEM,	)
	)
Respondent.	)

This Cause coming on to be heard on November 17, 1987, and at a term of this Court at the Supreme Court Courtroom in the City of Mitchell, State of South Dakota, upon the merits of the cause and upon oral argument of counsel, and the Court having advised thereon and filed its decision in writing, now, therefore,

IT IS CONSIDERED, ORDERED AND ADJUDGED that the Judgment of the Circuit Court, within and for Codington County, appealed

from herein, be and the same is hereby reversed,

AND IT IS FURTHER ORDERED that this cause be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

AND IT IS FURTHER ORDERED AND ADJUDGED that no costs be taxed.

BY THE COURT:

/s/ George W. Wuest
Chief Justice

ATTEST:
/s/ Gloria J. Engel
Clerk of the Supreme Court

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

COUNTY OF CODINGTON) THIRD JUDICIAL CIRCUIT

STEVEN SATTER, Petitioner,	)	
v.	)	MEMORANDUM OPINION
HERMAN SOLEM, Warden South Dakota State Penitentiary, Respondent.	)	#86-1170

A hearing was held in the Codington County Courthouse on September 10, 1986. The Petitioner Steven Satter appeared in person and with counsel Richard Braithwaite. The State was represented by Codington County States Attorney Roger Ellyson. At the conclusion of the evidentiary hearing the Court established a briefing schedule for counsel to submit authority for the respective positions.

The Petitioner testified in support of the allegations of his application for Writ of Habeas Corpus. While the State called

Paul I. Hinderaker, John L. Foley and Delbert Petersen in resistance to the Writ. The Court has taken judicial notice of the proceedings contained in criminal 73-1014, including the trial transcript, which will hereafter be referenced as (TT). The Court has also reviewed the transcript of the Habeas corpus Hearing which will be referenced as (HCT).

Petitioner alleges he was denied effective assistance of counsel. Strickland v. Washington, 466 U.S. 666, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) established two steps for determining ineffective assistance of counsel which are (1) the defendant must show that counsel's performance was deficient, and (2) the defendant must show that the deficient performance prejudiced the defendant. Strickland court further states that:

> "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts of [sic] omissions of counsel that are alleged to to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and make all significant decisions in the exercise of reasonable professional judgment... Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable;... Strickland, 80 L. Ed. 2d at 695.

The South Dakota Supreme Court has also recognized that if the acts complained of appear to be legitimate trial tactics, then the court will not second guess the defense counsel's judgment. Gibben [sic] v. State,

343 N.W.2d 788 (S.D. 1984); State v. Tschida, 347 N.W.2d 338 (S.D. 1984); D.Anderson v. State, 373 N.W.2d 438 (S.D. 1985); State v. Dornbusch, 384 N.W.2d 682 (S.D. 1986); State v. Anderson, 387 N.W.2d 544 (S.D. 1986).

The main thrust of Petitioner's argument centers around the admissibility of a written statement which was introduced at trial as Exhibit 21 and Exhibit 49 which contained the following paragraph:

> "This statement is given with the understanding that a polygraph test will be offered to me at a future date. Also that the State will not contest or object to the polygraph test being offered as evidence in court."

The Petitioner testified at the Habeas Corpus Hearing that he would not have signed the statement had that paragraph not been included and that he was induced to give that statement by the promise of the state investigator. Delbert Petersen the D.C.I. agent who took the statements in question and

reduced them to writing could not recall what motivated the Defendant to give and sign the statements. (See HCT pp. 77 and 78.)

It appears that if there is any conceivable legitimate trial strategy in allowing the admission of the written statement the conviction can be upheld. See Dornbusch, supra. [sic] and L.Anderson, supra. In my opinion, there are several legitimate reasons Hackett may have acquiesced in the admission of Satter's written statement.

Hackett was relying on the self-defense argument. Satter's written statement explained how the shootings occurred and that it was the decedents that drew their guns first. By allowing the admissions of this statement, Hackett may have decided to admit the killings, establish credibility, and rely on the self-defense argument.

The pathologist testified as to the manner of the killing. Satter's statement corresponds closely to what the pathologist stated, which in effect, could have established corroboration nd credibility of the statements, and supported the self-defense argument. See State v. Satter, 242 N.W.2d 149 (S.D. 1976). another indication of Hackett's self-defense strategy can be found in the Supreme Court Opinion. Hackett objected to the admission of several photos arguing: "... That it was not necessary to introduce the photos to establish the manner in which the victims were killed or to identify the victims inasmuch as the elements had been established by the Defendant's written statement, ..." Satter, supra at 153. (TT pp. 142-145, 148.)

Petitioner also contends that it was error not to have excised that part of the written statement referring to a polygraph

test and its admissibility. Regardless of whether that was a mistake or trial strategy, Satter was not prejudiced to the extent that there was a reasonable probability of a different result. See Strickland, 80 L. Ed. 2d at 698. We have no way of knowing the effect, if any, that the paragraph about the polygraph test had on the jury. This statement is actually a double-edged sword and we have no way of determining which way it cut if at all. The Petitioner had taken several polygraph examines. Some were passed, some were failed. He did, however, fail a polygraph examine concerning the subject matter contained in Exhibit 21 on April 11, 1973. (HCT p. 25.) It was the Petitioner's contention that he failed the polygraph dealing with the contents of his statement on April 11th because of his mistaken belief as to the possible defense of self-defense. (HCT pp. 43-47.) It is also

the Petitioner's contention that he was never granted another opportunity for polygraph examine concerning his statement as set out in Exhibits 21 and 49. The Petitioner did, however, on April 17th or 18th, 1983, take polygraph examines concerning a Custer homicide and one about buglaries [sic] which he claims to passed and then he claims he was refused any further polygraph examines. However, Delbert Petitioner who was responsible for setting upon the polygraph examines has no recollection of this. (HCT p. 70.) It might well have been a trial tactic for Attorney Hackett to leave this stone unturned since the Defendant has previously failed to examine on the same topic. A jury would not be cognizant of the fact that a polygraph is not admissible evidence at trial. Attorney Hackett had secured a surprising admission from Delbert Petersen on cross-examination that he

(Delbert Petersen) believed Exhibit 21 to be the truth. (TT p. 122.) Also the Defendant, now Petitioner, testified that Exhibit 21 was the truth. (TT p. 188.) Hence the enigma, the jury could decide that since Delbert Petersen testified he felt Exhibit 21 was the truth, the Defendant said it was the truth, and there was no testimony offered that the Defendant had failed a polygraph examine concerning Exhibit 21, the jury could deduce that the statement was in fact true which is the converse of Petitioner's proposition that by virtue of the reference in the statement of the polygraph examine the jury would deduce a failure by virtue of lack of testimony. What attorney Hackett was able to do in effect was to have one of the state's chief witnesses, Delbert Petersen D.C.I. agent, corroborate the veracity of Exhibit 21. It is my opinion that Hackett's actions regarding Satter's written statement were

part of a legitimate trial tactic. Satter's allegations are not sufficient to overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, or in other words, does not constitute action which might not be considered solid trial strategy.

In Strickland, as the court stated:

> "Among the factors relevant to deciding whether particular strategic choices are reasonable are the experience of the attorney, the inconsistency of unpursued and pursued lines of defendant, and the potential for prejudice from taking an unpursued line of defense. No particular detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant... It is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all to easy for a court, examining counsel's defense after it is proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable... A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hind sight [sic], to reconstruct the circumstances of

> counsel's challenge[d] conduct, and to evaluate the conduct from counsel's perspective at the time. Because of difficulties inherent in making the evaluation, a court must endulge [sic] a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. That is, the defendant must overcome the presumption that under the circumstances, the challenged action 'might be considered sound trial strategy'." 80 L. Ed. 2d 694.

Attorney Hackett was a trial lawyer with over 30 years of experience. He appeared before this Court numerous times. s Bill Hackett was a tenacious advocate for his client. He was a member of the South Dakota Trial Lawyers, Association of Trial Lawyers of American, The American Board of Trial Advocates, a Fellow of the International Society of Barristers, and a member of the American College of Trial Lawyers. (HCT p. 56.) This Court is satisfied that Attorney Hackett knew what he was doing at the time and that under the circumstances existed he made legitimate trial decisions.

There is an interesting colloquy that took place at the close of the case in chambers between Attorney Hackett, Petitioner Satter and the Court. (TT p. 227.)

BY MR. HACKETT: So that we have the record complete at this time, Mr. Satter has been present during all the trial of this case, has participated with me in it and I would ask Mr. Satter, have you participated in the trial of this matter and in connection with picking the jury?

BY MR. SATTER: Yes.

BY MR. HACKETT: Did you approve the jury as it was finally concluded and as we proceeded?

BY MR. SATTER: Yes, I did.

BY MR. HACKETT: Have you and I consulted throughout the trial concerning the questions and decisions that have come up?

BY MR. SATTER: Yes, we have.

BY THE COURT: Do you feel that your attorney has done a tremendous job for you?

BY MR. SATTER: Yes, I do.

BY THE COURT: Sometimes I even had to watch it, from the bench, he had a strong opponent to contend with.

BY MR. SATTER: I think Mr. Janklow is a fine lawyer. He has to be the ablest attorney I have encountered in a long time, and that has been quite a few.

The Petitioner, by his own admission, was certainly not a neophyte when it came to lawyers and court proceedings. He acknowledged consulting with Attorney Hackett and concurring in trial decisions. It is only some 13 years later when Attorney Hackett's death prevents further edification of his trial strategy and other witnesses'

including the Petitioner's memory have faded with time that Petitioner comes forward.

The Petitioner contends that his statement was conditional and since the condition was not met the statement became inadmissible. It is evidence from Petitioner's testimony and from the transcripts herein that Attorney Hackett considered the advisability of taking yet another polygraph and discussed it with Petitioner. (HCT p. 36.) Petitioner had failed a previously polygraph on the subject matter contained in his statements. The Court is dubious, to put it mildly, as to the plausibility of his explanation for his previous failure as I am sure attorney Hackett was. With the Petitioner's previous track record for failing polygraphs it would appear to have been an exercise in fertility [sic]. Attorney Hackett chose as a matter of trial strategy to waive the second polygraph,

extinguishing the condition contained in the statement.

This Court finds no basis for Petitioner's claim of a violation of his right against self-incrimination.

The Petitioner was taken into custody by his parole officer for a possible parole violation on March 1st, 1973. Attorney Hackett was contacted on behalf of Petitioner and visited with Petitioner at the jail on March 3rd, 1973. (HCT p. 8.) Petitioner saw Hackett periodically during the month of March. (HCT p. 9.) The Petitioner did not have any court appearances during the month of March, however, Petitioner was given his Miranda rights by law enforcement officers prior to questioning on some burglary investigations that were underway. (HCT pp. 11, 12, 33.) The Petitioner was not questioned about any deaths until April 5th or 6th, 1973, at which time Delbert Petersen

D.C.I. agent Mirandized him. (HCT p. 12.) At the time Sheriff Berg talked to Petitioner on April 2nd, 1973, the Sheriff was following up on an anonymous phone call he received on April 1st, 1973. The Sheriff's inquiry at that point was purely investigatory and not accusatory. When the Sheriff broached the subject of the hidden bodies with the Petitioner, Petitioner responded with a hypothetical situation to which the Sheriff responded. Nothing further was discussed. Petitioner then went on to voluntarily advise the Sheriff of the location of the bodies and how they got there. Petitioner never did refuse to talk to law enforcement or request an attorney before further interrogation. In any event, Petitioner was certainly aware of his Miranda rights at the time of his conversation with the Sheriff as they had been given to him on several previous occasions in the month March. (HCT p. 33.)

However, after further investigation which included recovery of the bodies the Petitioner was questioned again by Delbert Petersen D.C.I. agent and was specifically advised of his rights each time. (HCT p. 12.)

More specifically in reference to Petitioner's statements set out in Exhibits 21 and 49, Petitioner was Mirandized prior to giving these statements. (HCT p. 27.) And again Petitioner did not request an attorney or refuse to talk, he voluntarily proceeded to relate the matters set out in the statements in question. This Court accordingly finds there was no violation of the Petitioner's right against self-incrimination.

With reference to the contention set out in paragraphs three and four of Petitioner's Writ being the contention of insufficient evidence to convict and denial of due process

by virtue of the court's jury instructions, this Court is satisfied by reviewing the record that neither of these record that neither of these contentions reaches the level that would constitute a deprivation of the Petitioner's constitutional rights and find the same to be without merit and would question their propriety in this proceeding as Habeas Corpus cannot be utilized as a substitute for appeal and these matters do not rise to the level of a denial of a constitutional right. See Ruffin v. Jameson, 123 N.W.2d 654 (S.D. 1963, Burns v. Erickson, 129 N.W.2d 712 (S.D.1 964), Pekarek v. Erickson, 155 N.W.2d 313 (S.D. 1967), Fanning v. State, 180 N.W.2d 853 (S.D. 1970), Application of Williams, 193 N.W.2d 793 (S.D. 1972).

This Court is satisfied that the jury was faced with the classic resolution of conflicting testimony and credibility of

witnesses. In this case at hand the defendant's credibility was impuned (sic) by his actions and his testimony. The Petitioner had told three different stories. One to Sheriff Berg, one to Delbert Petersen, and finally the story contained in Exhibit 21. (TT pp. 78, 105, 110.) The Petitioner had lead the authorities, by his own admission, on six or eight wild good chases. (TT p. 121.) The Petitioner by this own admission conceded he had to lie to the authorities about other events. (TT p. 213.) The jury obviously chose to accept the testimony of the State's witnesses, Delbert Petersen, Curtis Berg, Don Waba, Jr., Jerry Lindbert and Dr. Alden Huepel over Petitioner Satter's.

For all the reasons herein before set forth Petitioner's Writ of Habeas Corpus is hereby denied.

Dated this 4th day of March, 1987.

BY THE COURT:

/s/Irvin N. Hoyt

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: ss	
COUNTY OF CODINGTON	)	THIRD JUDICIAL CIRCUIT
STEVEN SATTER, Petitioner,	)	
v.	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
HERMAN SOLEM, Warden, South Dakota State Penitentiary, Respondent.	)	

Hearing upon the Applicant's Application of Writ of Habeas Corpus, having been held in the Codington County Courthouse, in the City of Watertown, on September 10, 1986, the Petitioner Steven Satter, having appeared personally and with his counsel Richard Braithwaite, of Sioux Falls, South Dakota, and the Respondent, appearing by and through Codington County State's Attorney Roger W. Ellyson, and the Court having heard testimony and having reviewed the briefs submitted by each party and being in all things advised, now, the Court hereby makes the following:

FINDINGS OF FACT

I.

On May 10, 1974, Steven Satter was convicted of two (2) Counts of Murder, by a Codington County Jury and sentenced to two (2) life terms in the South Dakota State Penitentiary.

II.

William Hackett, an attorney of Watertown, South Dakota, represented Steven Satter at his murder trial.

III.

William Hackett was a trial lawyer with over twenty (20) years of experience and a member of the South Dakota Trial Lawyers, Association of Trial Lawyers of America, American Board of Trial Advocates, and a fellow of the International Society of Barristers, and a member of the American College of Trial Lawyers, and had appeared before this Court on numerous occasions and

was found to be a tenacious advocate for his client.

IV.

Attorney Hackett's decision not to challenge the admission of Defendant's written statements, Exhibit 21 and 49, was consistent with legitimate defense stategy [sic] and does not establish deficient professional conduct.

V.

Attorney Hackett's decision not to move to delete the paragraph dealing with a polygraph tests contained in Exhibits 21 and 49, was consistent with legitimate defense tactics and does not establish deficient professional conduct on the part of the attorney.

VI.

Attorney Hackett's decision not to request or demand a further polygraph test of Mr. Satter, was consistent with legitimate

defense stategy [sic] and does not establish deficient professional conduct on the part of Mr. Hackett.

VII.

Attorney Hackett's decision not to challenge Exhibits 21 and 49, did not prejudice Satter to the extent that there was a probability of a different result.

VIII.

Attorney Hackett's decision not to request or demand a further polygraph test did not prejudice Satter to the extent that there was a probability of a different result.

IX.

Statements made by Mr. Satter to law enforcement officials which were admitted to evidence at his trial, were freely and voluntarily made by him.

X.

That the Court's findings contained in it's Memorandum Opinion, dated March 4, 1987, are incorporated herein.

Based upon the foregoing Findings of Fact, the Court now makes and enters:

CONCLUSIONS OF LAW

I.

The Applicant, Steven Satter, was not denied the assistance of effective counsel at his trial.

II.

The Trial Court's admission into evidence of Satter's statements to law enforcement officials at his trial was not a violation of his right against self-incrimination.

III.

That each of the other points of contention made by Steven Satter are without

merit and or not properly before this Court in a proceeding for Habeas Corpus.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Done by the Court this 18th day of March, 1987.

ATTEST:

/s/ Donna Briggs
Clerk of Courts
(SEAL)

BY THE COURT:

/s/ Irvin H. Hoyt
Judge of the Circuit Court

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF CODINGTON	)	THIRD JUDICIAL CIRCUIT
STEVEN SATTER, Petitioner,	)	
v.	)	JUDGMENT DENYING WRIT OF HABEAS CORPUS
HERMAN SOLEM, Warden, South Dakota State Penitentiary, Respondent.	)	

Hearing having been held in the above-entitled matter in the Courtroom of the Codington County Courthouse, in the city of Watertown, on September 10, 1986, the Applicant, Steven Satter, having appeared personally and with his attorney Richard Braithwaite, of Sioux Falls, South Dakota, and the Respondent appearing by and through Roger W. Ellyson, Codington County State's Attorney, and the Court having heard testimony and having now entered its Findings of Fact and Conclusions of Law, together with its Memorandum of Opinion, now therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Petitioner's Writ of Habeas Corpus is hereby denied.

Done by the Court this 18th day of March, 1987.

BY THE COURT:
/s/ Irvin H. Hoyt
Judge of the Circuit Court

ATTEST:

/s/ Donna Briggs, Deputy Clerk
(SEAL)

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF CODINGTON	)	THIRD JUDICIAL CIRCUIT
STEVEN SATTER, Petitioner,	)	
v.	)	APPLICATION FOR A WRIT OF HABEAS CORPUS
HERMAN SOLEM, Warden, South Dakota State Penitentiary, Respondent.	)	

COMES now the applicant herein, Steven Satter, pursuant to the Habeas Corpus Act: SDCL 21-27 et seq., and alleges and complains that he is unlawfully imprisoned and detained by Herman Solem, Warden of the South Dakota Penitentiary in Sioux Falls, Minnehaha County, South Dakota, under and by virtue of a Judgment of Conviction entered by the Honorable Gordon Mydland, presiding as Judge of the Third Judicial Circuit, Codington County, South Dakota. A photocopy of said Judgment of Conviction is attached hereto and made a part hereof by this reference. A memorandum of law, and a motion and

affidavit, are attached hereto and made a part hereof by this reference.

Specifically, applicant states and alleges:

I

That he was denied the effective assistance of counsel guaranteed him by the Sixth Amendment to the United States Constitution, and Article VI, section seven, of the South Dakota Constitution.

II

That his conviction was the result of a violation of his right against self-incrimination secured to him by the Fifth Amendment to the United States Constitution, and Article VI, section nine, of the South Dakota Constitution.

III

That there was insufficient evidence to convict and therefore applicant was denied the due process of law guaranteed him by the

Fourteenth Amendment to the United States Constitution, and Article VI, section two, of the South Dakota Constitution.

IV

That by virtue of the Court's instructions to the jury, applicant was denied the due process of law guaranteed him by the Fourteenth Amendment to the United States Constitution, and Article VI, section two, of the South Dakota Constitution.

Applicant filed with this Court a petition for relief under the Uniform Post Conviction Act on July 18, 1979; raising the same issue set out in issue IV, this application. On August 10, 1979, applicant requested the withdrawal of that petition pursuant to SDCL 23A-34-14 (repealed), prior to any relief being granted by the Court.

Applicant further informs the Court that this application is made in good faith; that by virtue of thirteen years of incarceration

he is indigent and does not have the means to defray the costs of this action or to give security therefor; nor does he have the means to employ counsel to represent him herein.

WHEREFORE, applicant prays as follows:

(A) That this Court appoint counsel to represent him in these proceedings,

(B) That because this application and accompanying documents in support thereof were drawn without benefit of counsel, that counsel be allowed to correct and amend prior to hearing,

(C) That a writ of habeas corpus issue out of this Court to respondent herein, commanding him forthwith to have the body of the applicant before the Court together with the cause of his detention, and to abide the further order of the Court herein,

(D) And for such other and further relief as the Court may deem just and equitable in the premises.

Respectfully submitted,

/s/ Steven Satter
Applicant - Pro Se
Post Office Box 911
Sioux Falls, S. Dak.
57117-0911

Subscribed and sworn to before me
this 29th day of April, 1986.

/s/ Aldon Lee Meinos
Notary Public - South Dakota
My commission expires: July 9, 1989

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF CODINGTON	)	THIRD JUDICIAL CIRCUIT
STEVEN SATTER,	)	
	)	
Petiioner,	)	
	)	
vs.	)	WRIT OF HABEAS CORPUS
	)	
HERMAN SOLEM, Warden, South Dakota State Penitentiary,	)	
	)	
	)	
Respondent.	)	

TO: RESPONDENT, WARDEN OF THE SOUTH DAKOTA STATE PENITENTIARY, and THE SHERIFF OF CODINGTON COUNTY, SOUTH DAKOTA GREETINGS:

You are commanded to have the body of STEVEN SATTER, now detained in the South Dakota State Penitentiary in the city of Sioux Falls, South Dakota, under the custody of the Warden of said prison under safe and secure conduct before this court sitting at the Codington County Courthouse in the city of Watertown, South Dakota on the 10th day of September, 1986 at 10:30 A.M., for the purpose of attending a hearing on his petition for habeas corpus relief.

Said hearing is to take less than the remainder of the day and upon completion of said hearing, you return him to the said Penitentiary under safe and secure conduct, and have you then and there this Writ.

Witness the Honorable Irvin N. Hoyt, Judge of the above entitled court, this 30th day of July, 1986.

BY THE HABEAS CORPUS ACT:

/s/ Irvin H. Hoyt
Circuit Court Judge

ATTEST:

/s/ Glenn L. Nisich, Clerk

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF CODINGTON	)	THIRD JUDICIAL CIRCUIT
STEVEN SATTER,	)	
	)	
Petiioner,	)	
	)	
vs.	)	RETURN TO WRIT
	)	
HERMAN SOLEM, Warden, South Dakota State Penitentiary,	)	
	)	
	)	
Respondent.	)	

COMES NOW, the respondent, by and through Roger W. Ellyson, Codington County States Attorney and for his return, states and alleges as follows:

I.

That Steven Satter, remains lawfully in prison and detained by Herman Solem, Warden of the South Dakota Penitentiary, in Sioux Falls, South Dakota, under and by virtue of a Judgment of Conviction entered by the Honorable Gordan Mydland, Circuit Judge of the Third Judicial Circuit, Codington County, South Dakota, dated May 10, 1974.

Said hearing is to take less than the remainder of the day and upon completion of said hearing, you return him to the said Penitentiary under safe and secure conduct, and have you then and there this Writ.

Witness the Honorable Irvin N. Hoyt, Judge of the above entitled court, this 30th day of July, 1986.

BY THE HABEAS CORPUS ACT:

/s/ Irvin H. Hoyt
Circuit Court Judge

ATTEST:

/s/ Glenn L. Nisich, Clerk

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF CODINGTON	)	THIRD JUDICIAL CIRCUIT
STEVEN SATTER,	)	
	)	
Petiioner,	)	
	)	
vs.	)	RETURN TO WRIT
	)	
HERMAN SOLEM, Warden, South Dakota State Penitentiary,	)	
	)	
Respondent.	)	

COMES NOW, the respondent, by and through Roger W. Ellyson, Codington County States Attorney and for his return, states and alleges as follows:

I.

That Steven Satter, remains lawfully in prison and detained by Herman Solem, Warden of the South Dakota Penitentiary, in Sioux Falls, South Dakota, under and by virtue of a Judgment of Conviction entered by the Honorable Gordan Mydland, Circuit Judge of the Third Judicial Circuit, Codington County, South Dakota, dated May 10, 1974.

II.

Respondent denies each and every allegation contained in the Applicant's application for a Writ of Habeas Corpus.

Dated this 31 day of July, 1986, in Watertown, South Dakota.

/s/ Roger W. Ellyson
Codington County State's Attorney
Attorney for Respondent

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF CODINGTON	)	THIRD JUDICIAL CIRCUIT
STEVEN SATTER,	)	
	)	
Petiioner,	)	
	)	
vs.	)	JUDGMENT AND SENTENCE
	)	
HERMAN SOLEM, Warden, South Dakota State Penitentiary,	)	
	)	
Respondent.	)	

AN INFORMATION having been duly filed in the above entitled Court by John L. Foley, State's Attorney of Codington County, South Dakota, on the 21st day of May, 1973 and an Amended Information filed by the States' Attorney on the 7th day of May, 1974, charging the said Defendant with the crime of MURDER-TWO COUNTS and said Defendant having been duly arrainged [sic] upon the Information, as first filed, on the 21st day of May, 1973, William A. Hackett, appearing as Attorney for said Defendant upon such arraignment and said Defendant having duly

entered in open Court his oral plea of "not guilty" of the charge in said Information contained:

And said cause having been regularly brought on for trial upon the issue joined therein, said Defendant appearing in person and by his Attorney, William A. Hackett, and a jury being duly impanelled and sworn to try said cause and having heard the evidence adduced by the Parties, and the jury on the 10th day of May, 1974, having returned into open Court in the presence of said Defendant their oral verdict: "Guilty of Murder-Count One, Guilty of Murder-Count Two", and the Court thereupon upon the request of said Defendant and his Attorney, William A. Hackett, appointed the 10th day of May, 1974, for Sentence and Judgment herein:

And this being the time appointed for Judgment herein, the said Defendant appearing in person and by his Attorney in Court

hereupon informed said Defendant of the nature of the Information and of the verdict nd was asked by the Court whether he had any egal cause to show why Judgment should not e pronounced against him, and there being no ufficient cause the Court thereupon ronounced the following Judgment and

S E N T E N C E

AND NOW, this 10th day of May, 1974, the ourt being fully advised in the premises, IT S

ORDERED AND ADJUDGED that you STEVEN LLAN SATTER, as to Count I, be imprisoned in he State Penitentiary situated in the City f Sioux Falls, County of Minnehaha, State of outh Dakota, to hard labor, for the term of IFE, there to be kept, fed and clothed ccording to the rules and discipline overning said Institution; and it is

FURTHER ORDERED AND ADJUDGED that you TEVEN ALLAN SATTER, as to Count II, be

imprisoned in the State Penitentiary situated in the City of Sioux Falls, County of Minnehaha, State of South Dakota, to hard labor for the term of LIFE, there to be kept, fed and clothed according to the rules and discipline governing said Institution.

IT IS FURTHER ORDERED AND ADJUDGED that you stand committed to the custody of the Sheriff of Codington County, South Dakota, pending the execution of this Judgment.

DONE IN OPEN COURT this 10th day of May, 1974.

BY THE COURT:

/s/ Gordon Mydland
Judge of the Circuit Court

ATTEST:

/s/ Glenn L. Nisick
Clerk of Courts
(SEAL)

VOLUNTARY STATEMENT

ATE: April 11, 1973
LACE: Chief of Police Office,
Watertown, So. Dak.
IME STARTED: 8:50 P.M.

, Steven Allan Satter, am 25 years old. My ate of birth is October 25, 1947.

live at 608 - 6th St. S.E., Watertown, outh Dakota.

he person to whom I give the following oluntary statement, Delbert D. Petersen, aving identified and made himself known as a pecial Agent of the Division of Criminal nvestigation, Attorney Generals' Office, ierre, South Dakota.

ULY WARNED AND ADVISED ME, AND I KNOW:

. That I have the right to remain silent and not make any statement at all, nor incriminate myself in any manner whatsoever.

. That anything I say can and will be used against me in a court or courts of law for the offense or offenses concerning which this statement is herein made.

. That I can hire a lawyer of my own choice to be present and advise me before and during this statement.

. That if I am unable to hire a lawyer I can request and receive appointment of a lawyer by the proper authority, without cost or charge to me, to be present and

advise me before and during this statement.

5. That I can refuse to answer any questions or stop giving this statement any time I want to.

6. That no law enforcement officer can prompt me what to say in this statement, nor write it out for me unless I choose for him to do so.

A. No one denied me any of my rights, threatened or mistreated me, either by word or act, to force me to make known the facts in this statement. No one gave, offered or promised me anything whatsoever to make known the facts in this statement, which I give voluntarily of my own free will and accord.

B. I do not want to talk to a lawyer before or during the time I give the following true facts, and I knowingly and purposely waive my right to the advice and presence of a lawyer before and during this statement.

C. I certify that no attempt was made by any law enforcement officer to prompt me what to say, nor was I refused any request that the statement be stopped, nor at anytime during this statement did I request for the presence or advice of a lawyer.

I have read each page of this statement consisting of 1 pages, each page of which bears my signature, and corrections, if any bear my initials, and I certify that the facts contained herein are true and correct.

This statement was completed at 9:20 P.M. on the 11th day of April, 1973.

WITNESS: /s/ Al H. Freesemann
WITNESS: /s/ Delbert D. Petersen
/s/ Steven Allan Satter
Signature of person giving voluntary statement

STATEMENT

I, STEVEN ALLAN SATTER, give the following voluntary statement to Delbert D. Petersen,* who has identified himself as a Special Agent of the Division of Criminal Investigation, Pierre, South Dakota.

I have been advised of my right to remain silent; anything that I say can and will be used again'st [sic] me* in a court of law; I have the right to talk to a lawyer and have him present while I am being questioned and if I cannot afford to hire a lawyer, one will be appointed to represent me before and questioning, if I wish one. I understand each of these rights that I have had explained to me and wish to wave [sic] these rights at this time.

About 9:30 a.m. the 20th day [sic] of August 1972, I drove my sister Marianne's 1966 Ford car to Kent Engle & Jerry Bowling's trailer house by Lake Pelican located southwest of Watertown, So.Dak. I had* put under my belt when I left home my 22 cal. [sic] revolver as I was expecting trouble. I entered the door in the trailer house and Kent Engle was sitting at the kitchen table. An argument started over some pictures that he had taken of my sister Marianne. Kent then walked over again'st [sic] the west living-room wall at which time he drew a small pistol on me. I then drew the 22 cal. revolver that I had and shot directly at his head hitting him in the right temple area. as* He [sic] fell to the floor, and* I shot him the second time. About that time Jerry Bowling came out of the first bedroom with a drawn* revolver and I shot him first and he fired one shot at me and I shot him in the head. He fell to the

floor and I shot him once more in the head at close range.

I left this trailer-house and came back about 6 pm that night of August 20, 1972. I backed the 1966 Ford thaq [sic] I was driving, up on the north side of this trailer house, opened the trunk and put Kent Engle and Jerry Bowling out the kitchen window into the trunk of my car. I then drove around the country looking for a place to dump their bodies. Atter* dark I put their bodies in a rock pile located two (2) miles south, 1/4 mile east, 1/4 mile north, and 200 yards west of Kranzburg, South Dakota. I covered their bodies with rock. The night of Augsut* 20, 1972 while at their trailer house picking up the bodies I washed the blood off the walls of this trailer house.

This statement is given with the understanding that a polygraph test will be offered to me at a future date. Also that the state will not contest or object to the polygraph test being offered as evidence.

I have read the above statement and fidd [sic] it true to the best of my knowledge.

Dated April 11, 1973 at the Chief Of Police Office, Watertown, South Dakota.

/s/ Steven Allan Satter

witness:

/s/ Al H. Freesemann
/s/ Delbert D. Petersen

I received a copy of this state.

/s/ Steven Allan Satter

(* indicates initials of Steven Satter.)

A-131

VOLUNTARY STATEMENT

DATE: April 14, 1973
PLACE: Chief of Police Office, Watertown, So. Dak.
TIME STARTED: 1:33 P.M.

I, Steven Allan Satter, am 25 years old. My date of birth is October 25, 1947.

I live at 608 - 6th St. S.E., Watertown, South Dakota.

The person to whom I give the following voluntary statement, Delbert D. Petersen, having identified and made himself known as a Special Agent of the Division of Criminal Investigation, Attorney General's Office, Pierre, South Dakota.

DULY WARNED AND ADVISED ME, AND I KNOW:

1. That I have the right to remain silent and not make any statement at all, nor incriminate myself in any manner whatsoever.

2. That anything I say can and will be used against me in a court or courts of law for the offense or offenses concerning which this statement is herein made.

3. That I can hire a lawyer of my own choice to be present and advise me before and during this statement.

4. That if I am unable to hire a lawyer I can request and receive appointment of a lawyer by the proper authority, without cost or charge to me, to be present and

advise me before and during this statement.

5. That I can refuse to answer any questions or stop giving this statement any time I want to.

6. That no law enforcement officer can prompt me what to say in this statement, nor write it out for me unless I choose for him to do so.

A. No one denied me any of my rights, threatened or mistreated me, either by word or act, to force me to make known the facts in this statement. No one gave, offered or promised me anything whatsoever to make known the facts in this statement, which I give voluntarily of my own free will and accord.

B. I do not want to talk to a lawyer before or during the time I give the following true facts, and I knowingly and purposely waive my right to the advice and presence of a lawyer before and during this statement.

C. I certify that no attempt was made by any law enforcement officer to prompt me what to say, nor was I refused any request that the statement be stopped, nor at anytime during this statement did I request for the presence or advice of a lawyer.

I have read each page of this statement consisting of 1 page(s), each page of which bears my signature, and corrections, if any bear my initials, and I certify that the facts contained herein are true and correct.

This statement was completed at 1:55 P.M. on the 12th day of April, 1973.

WITNESS: /s/ Al H. Freesemann
WITNESS: /s/ Delbert D. Petersen
/s/ Steven Allan Satter
Signature of person giving voluntary statement

STATEMENT

I, STEVEN ALLAN SATTER, give the following voluntary statement to Delbert D. Petersen, who has identified himself as a Special Agent of the Division of Criminal Investigation,* Pierre, South Dakota.

I have been advised of my right to remain silent; anything that I say can and will be used against me in a court of law; I have the right to talk to a lawyer and have him present while I am being questioned and if I cannot afford to hire a lawyer, one will be appointed to represent me before and questioning, if I wish one. I understand each of these rights that I have had explained to me and wish to waive these rights at this time.

About 9:30 a.m. the 20th day of August 1972, I drove my sister Marianne's 1966 Ford car to Kent Engle* & Jerry Bowling's trailer house by Lake Pelican located southwest of Watertown, So. Dak. I had put under my belt when I left home my 22 cal. revolver as I was expecting trouble. I entered the door in the trailer house and Kent Engle was sitting at the kitchen table. An argument started over some pictures that he had taken of my sister Marianne. Kent then walked over against the west living-room wall at which time he drew a small pistol on me. I then drew the 22 cal. revolver that I had and shot directly at his head hitting him in the right temple area. As he fell to the floor, I shot him the second time. About that time Jerry Bowling came out of the first bedroom with a drawn revolver and I shot him first and he fired one shot at me and I shot him in the head.

He fell to the floor and I shot him once more in the head at close range.

I left this trailer-house and came back about 6 pm that night of August 20, 1972. I backed the 1966 Ford that I was driving, up on the north side of this trailer house, opened the trunk and put Kent Engle and Jerry Bowling out the kitchen window into the trunk of my car. I then drove around the country looking for a place to dump their bodies. After dark I put their bodies in a rock pile located two (2) miles south, 1/4 mile east, 1/4 mile north, and 200 yards west of Kranzburg, South Dakota. I covered their bodies with rock. The night of August 20, 1972 while at their trailer house picking up the bodies I washed the blood off the walls of this trailer house.

This statement is given with the understanding that a polygraph test will be offered to me at a future date. Also that the state will not contest or object to the polygraph test being offered as evidence.

I have read the above statement and find it true to the best of my knowledge.

Dated April 12, 1973 at the Chief of Police Office, Watertown, South Dakota.

/s/ Steven Allan Satter

witness:

/s/ Al H. Freesemann
/s/ Delbert D. Petersen

I received a copy of this state.

/s/ Steven Allan Satter

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)SS
COUNTY OF CODINGTON) THIRD JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
PLAINTIFF,

vs TRANSCRIPT

STEVEN ALAN SATTER,
DEFENDANT.

The above entitled matter came on for jury trial in the above entitled court, Hon. Gordon Mydland, Judge, presiding in the courtroom at Watertown, Codington County, South Dakota, commencing on May 7, 1974, at ten o'clock a.m.

The State was represented by John Foley, States Attorney Robert Wagner, Deputy States Attorney, and William Janklow, Assistant Attorney General, of Pierre, South Dakota.

The defendant was present in person and represented by his attorney, W. A. Hackett, and Paul Hinderaker, of the firm of Austin,

Hinderaker & Hackett of Watertown, South Dakota.

[TT 2]

CURTIS BERG,

being called as the next witness, and being first duly sworn, testified as follows:

EXAMINATION BY MR. JANKLOW:

Q Would you please state your name?

A Curtis A. Berg.

[TT 69]

Q Where do you live, sir?

A 811 First Avenue Southeast, Watertown, South Dakota.

Q You are the Codington County sheriff?

A Yes, I am.

Q How long have you held that position?

A Approximately three and a half years.

Q Directing your attention to April, 1973, did there come a point in time when you

conducted an investigation into the whereabouts of any bodies?

A Yes.

Q Will you explain to the court and jury why you were conducting that investigation?

A At approximately 10:30 p. m. on April 1, 1973, I received a telephone call at home, at my residence, from what I thought was a male subject, advising me that---

BY MR. HACKETT: We object to that as hearsay.

BY MR. JANKLOW: Your Honor, it was offered to show what was said to him, not for the truth of what was said, therefore it is outside the scope of hearsay. We are not offering it to show that something that was said was true, just that something was told to him.

BY THE COURT: It will be admitted.

BY MR. HACKETT: May it be admitted, Your Honor, with the admonition that that is how it is admitted?

[TT 70]

BY THE COURT: Yes, the jury is to be advised that that is the purpose of the question; it is merely for the purpose of showing what was said and not the truthfulness of it. You may proceed.

A This person called me there and told me that I wasn't looking for the bodies south of Kranzburg very hard, and I said, "Well, can you give me a description of where they are at?" and this person said they should be half a mile south of where the bale stacks burned up last fall, which would have been the fall of 1972. I said I needed

more of a description of where these bodies would be at, and he said they would be in a rock pile, he thought, and if I could not find them myself, to go talk to a subject that we had in jail, in custody. At this time I asked this person who this person was that we had in jail who would know the whereabouts of these bodies, and this person told me to go down and talk to Steve Satter whom we had in jail. I then asked this person who was calling and the person hung up.

Q As a result of that telephone call, what did you do?

A That night I didn't do anything, but the next morning after we were thrcugh with District County Court, at approximately eleven o'clock, I drove out to the area where the bale stocks had burned up, which was one mile

[TT 71]

south of Kranzburg and approximately one quarter mile east, and I drove a half mile south of there yet and went to an area along an old abandoned railroad track. It is farm ground and pasture ground in this area, and a lot of large rock piles, just normal farm area. I looked around at different rock piles along the railroad tracks and along other side roads that went up to a field there and I was unable to locate anything there at his [sic] time.

I came back to Watertown and had dinner,and [sic] after dinner I went over to the police department and talked to Steve Satter reference to a number of burglaries that him and another fellow had been involved in. We talked about this for a while, and at that time I asked him if he knew anything about two

bodies that were supposed to be buried somewhere around the Watertown area.--

BY MR. HACKETT:----That is enough, you have answered the question.

Q Sheriff, at the time you had this conversation with Steve Satter, who was present? Just the two of you, or who else was present in your office?

A This wasn't in my office, this was in one of the offices in the Watertown Police Department.

Q Was there anyone else present besides you and Mr. Satter?

A No, there wasn't.

[TT 72]

Q Now, when you asked that question of Steve Satter, did he give you any response?

BY MR. HACKETT: Excuse me, may I ask a question for the purpose of objection?

BY THE COURT: Certainly.

BY MR. HACKETT: At the time when you were talking to Steve Satter, is it my understanding that you were alone?

A Yes, it was.

Q Did you know that you were going to discuss with him the location of these bodies that you were told about in the telephone conversation?

A Did I know that I was?

Q Did you know you were going to do that?

A Before I went over there?

Q Yes.

A Yes, I did.

Q At this time did you advise him of his constitutional rights?

A No, I didn't.

Q Did you tell him he had a right to have a lawyer present before you talked to him?

A No, I didn't.

Q You didn't read him his rights off your little card?

[TT 73]

A No, I did not.

BY MR. HACKETT: Your Honor, I object to this testimony on the ground---

BY MR. JANKLOW: ---May I lay additional foundation? I will withdraw the question --

BY MR. HACKETT: --Well, just let me finish my objection.

BY MR. JANKLOW: I am withdrawing the question.

BY MR. HACKETT: Does the record show the withdrawal of the question?

BY THE COURT: The record will show that the question has been withdrawn.

Q At the time you had this conversation with Steve Satter in your office, Sheriff, was Steve Satter suspect in your mind or was he under any investigation at all for any criminal activity involving two bodies?

BY THE COURT: Excuse me, counsel, I believe you meant at the police department; you said in your office.

BY MR. JANKLOW: I meant at the office of the police department.

A No, he was not.

Q Was he in custody?

A Yes, he was.

Q What was he in custody for?

A He was in custody for a number of burglaries that had happened in the Watertown area.

Q Was he being held in custody pursuant to anything that pertained to any bodies, or any physical activity or harm to any human being?

A Not that I know of.

Q Had you ever had any report from anybody that he had been involved with any criminal activity with respect to physical violence toward any human being?

A No, I had not.

Q He was not a suspect with reference to any bodies or anything of that nature?

A He was not.

Q Now I will ask the question, Sheriff, at the time you had this conversation with Steve Satter in the office of the police station, what did he tell you in

response to your question about what he knew of any bodies in the Watertown area?

BY MR. HACKETT: We object for the reason and upon the grounds that it is a violation of the defendant's constitutional rights, and it is immaterial, incompetent and irrelevant for any purpose.

BY THE COURT: Overruled. He may answer.

BY MR. HACKETT: Just a minute before we go on. I

[TT 75]

think that is a very good point and I would like to have, so that I don't have to interrupt Mr. Janklow, a standing objection to any further testimony concerning these conversations.

BY THE COURT: Certainly, you may.

A At the time I asked Mr. Satter this, he did not answer me yes or no. The only thing he said to me, he said, "Well, let's just take a hypothetical case, for instance, say I was paid a thousand dollars to go out and destroy two bodies that are buried, what would I be charged with?" At this time I asked him, I said, "You mean, criminally?" He said, "Yes." And I said, "Well, I am not speaking for the States Attorney's office, but I felt he could possibly be charged with being an accessory."

Q Did you have any further conversation with him at that time after you said that?

A Yes, I did. We talked for a little bit after that, and I never did ask him again where those bodies were at, he just told me they were two miles south of Kranzburg, he said you go east on a

side road until you come to a fence that goes north up through a field, you follow along that fence until you come to an abandoned railroad track, and you follow that on for approximately a block and you come to a rock pile, and he said they will be buried on the east side of the big rock pile underneath

[TT 76]

a little rock pile.

Q Sheriff, did Mr. Satter ever tell you how these bodies got to the rock pile?

A No, he never did tell me how they got there. He told me what----

BY MR. HACKETT: Just yes or not. YOu [sic] have answered.

Q Did he ever tell you how these bodies became dead bodies?

A Yes, he did.

Q Will you please explain to the court and jury what he told you about that?

A He told me that a fellow by the name of Amilio Deluci (spelling unknown) had come out from Minneapolis to collect his percentage of the take on some burglaries. This Deluci was supposed to be the middle man who was supposed to have set up burglaries for these other two fellows to do. And this Deluci had come out to collect from these other fellows, and when he got there these two fellows had taken and spent his share of the money so, in turn, he had shot them for this.

Q When you say he had shot them, who was Steve Satter referring to?

A This Amelio Deluci.

Q According to Steve Satter's story, how did Satter get involved in this?

A Steve Satter advised me that this Amelio Deluci had

come to him and given him $1000 to go out and burn up these bodies.

Q Burn them up? How?

A With a cutting torch.

Q That is how he got involved with it?

A Yes.

Q Did he tell you whether or not he had gone out and cut up these bodies with a cutting torch?

A I asked him if he did and he said no, he couldn't stand the smell, or he couldn't bring himself to do it because he couldn't stand the smell of the bodies.

Q Did you ever ask him if he knew the names of the individuals who were supposed to be buried under the rocks, who were supposed to have been killed by Deluci?

A I asked him and he advised me that one was a subject by the name of Jerry

Bowling, but he did not know who the other individual was.

Q Do you remember him specifically telling you he did not know who the other individual was?

A Yes, I do.

Q As a result of this conversation you had with Steve Satter, and the directions he gave you as to where these bodies were in this hypothetical case, did you go out to the location and attempt to follow his map?

A Yes, I did, at approximately four p. m. I drove out

[TT 78]

there by following the directions he had given me.

Q Was anyone with you?

A No, I was alone.

Q Will you please describe the route you took to the court and jury?

A I was advised to drive out to the Tip Top Tavern, which is located on the very western edge of Kranzburg, on east 212 from Watertown---

BY MR. HACKETT: Just a minute, Your Honor, I move to strike that as not responsive.

BY THE COURT: Just restrict your answer strictly to the question asked.

A Ok. When I got to the Tip Top Tavern----

BY THE COURT: Excuse me, will you re-ask your question.

Q Yes. And just answer exactly the question.

You testified that you attempted to follow the directions that Steve Satter had given you to get to the bodies, is that right?

A I did.

Q Will you please describe to the jury the route you followed from the time you left the sheriff's office?

A I left the police department, and I went down to Highway 212 and I went east until I got to the Tip Top Tavern, which is on the western edge of Kranzburg. From the Tip

[TT 79]

Top Tavern I proceeded two miles south on a blacktop road until I came to a township road, then went east about a half mile until I came to a fence that went north through the field, and there is a little trail along the western edge of this fence. I followed that until I came to an old abandoned railroad track. At that time I parked my vehicle, got out and walked town this abandoned railroad track until I came to a rock pile on the north side of there. There

is also a very large rock pile on the south side of the track but I went to the one on the north side of the tracks because this is where I was directed to. I went down the embankment along the tracks to the small pile that was on the east side of the big pile. This is where I located the two bodies.

[TT 80]

EXAMINATION BY MR. HACKETT:

Q Sheriff, who was that fellow you say Steve told you about in Minneapolis?

A Amelio DeLuci.

Q Did you ever look for Amelio Deluci?

A Yes, we did.

Q How did you do that?

A We checked in the Minneapolis area.

Q What did you find?

A Nothing.

Q What did that indicate to you, Sheriff?

A That indicated to me that probably Steve Satter wasn't telling the truth.

Q Did it indicate to you that there wasn't any such person?

A Yes, it did.

Q Prior to the time you had these conversations, or the time you had them with Steve Satter, did you tell him that whatever he told you would be held in confidence between you?

[TT 93]

A Between him and me?

Q Yes.

A No, sir, not that I remember.

[TT 94]

Q Sheriff Berg, in connection with Mr. Satter's involvement

[TT 97]

in these burglaries, isn't it a fact that Mr. Satter made a complete confession about those burglaries to you

or to the police department while he was in jail down there?

A Yes, he did.

DELBERT PETERSON,

being first duly sworn, testified as follows:

EXAMINATION BY MR. JANKLOW:

Q Will you please state your full name?

A Delbert Peterson.

Q Where do you live?

[TT 98]

A Hayti, South Dakota.

Q By whom are you employed?

A Division of Criminal Investigation, State of South Dakota.

Q Do you have a title?

A Yes, Special Agent.

Q How long have you been a Special Agent for the Division of Criminal Investigation in South Dakota?

A Going on 21 years.

Q Before that did you have any law enforcement experience?

A I did.

Q What was your experience?

A I was sheriff of Hamlin County for four years.

Q Directing your attention to April, 1973, Mr. Peterson, around April 8, 1973, where were you at?

A I was in Watertown, South Dakota.

Q Excuse me, April 2, 1973, where were at?

A I was in Minneapolis, Minnesota.

Q So you were not in the area?

A That is right.

Q What is your area? Do you have an area that you cover in the State?

A I cover from Sioux Falls to the North Dakota line. Eleven counties, total.

Q Is this pursuant to conducting investigations for the

Division of Criminal Investigation?

A That is right.

Q Among other things?

A Right.

Q After April 2, 1973, did you return to your area of work?

A I did.

Q What was the reason for that?

A I received a call from the Sheriff's office in Watertown, South Dakota, advising me of two bodies that were found and requesting that I return immediately.

Q When you arrived back in the area---when did you arrive?

A April 4, 1973.

Q What did you do after you arrived back in the area?

A I came to Watertown and contacted the Sheriff's office and the police department.

Q Did there come a point in time when you met Steve Satter?

A There did.

Q Do you remember when the first time was that you met Steve Satter?

A At this time it was April 5, 1973.

Q Where did you meet Steve Satter?

A At the City jail, Watertown, South Dakota.

Q Is the Steve Satter you met on April 5, 1973, in Watertown, South Dakota, present in this courtroom?

A He is.

[TT 100]

Q Will you please point him out and identify him?

A He is sitting behind Mr. Hackett, his counsel.

BY MR. JANKLOW: Let the record show that he has correctly

identified the defendant, Steve Satter.

Q Was there anyone else present at the time you met Mr. Satter on April 5, 1973?

A Not at that time.

Q Did you have any conversation with him at that time?

A I did.

Q Was it relative to anything you were investigating?

A It was.

Q Where were the two of you located?

A In the City Attorney's office at the police department in Watertown, South Dakota.

Q Are you familiar with what is known as the Miranda warning?

A I am.

Q Didyou [sic] give the Miranda warning to Mr. Satter on that date?

A I did.

Q Did you give him this Miranda warning before you questioned Mr. Satter?

A I did.

Q Will you please explain to the court and jury what you said to Steve Satter before you asked him any questions.

[TT 101]

A We have a plastic card with the Miranda warning on it that we use, and I read this warning to Mr. Satter at that time.

Q Do you have that card with you now?

A I do.

Q Is it the same card you used on April 5, 1973?

A It is.

Q Mr. Peterson, will you please tell the court and jury exactly what you read to Mr. Satter, word for word?

A You have the right to remain silent; anything you say can and will be used

against you in a court of law; you have the right to talk to a lawyer and have him with you while you are being questioned. If you can not afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.

Then on the back are two also, and they are called waivers, and Number 1, is " Do you understand each of these rights that I have explained to you?" And,"Having these rights in mind, do you wish to talk to us now?

Q You read all that to Mr. Satter?

A I did.

Q Did he respond to you after that?

A He did.

Q What did he say to you?

A I asked him again if he understood them, and he said, Yes.

[TT 102]

Q Did he indicate that he wanted to talk to you?

A Yes.

Q Did you then proceed to question him?

A I did.

Q Will you state what you asked him and what answers he gave you?

A I would have to look at my notes, if this is ok with you and the court.

Q Did you prepare those notes at or shortly after the time you had the conversation with Mr. Satter?

A I did, at the time.

Q Right at the time?

A Yes.

Q Would they be more accurate recollection of your memory at that time than your present memory would be?

A Under the circumstances, I believe they would be.

BY MR. JANKLOW: May he use his notes, Your Honor?

BY THE COURT: Yes, he may use his notes.

A During this interview I had with Mr. Satter on April 5, 1973, I asked him for his date of birth, and his address, then after I read him the Miranda warning the interview began, and at this time I will call him Steve, as I put in my report here, stated to me that a Harold Gray of Minneapolis was out to see him in 1970. He described him as about 40, weighing about 200 pounds, and had

[TT 103]

light brown hair. Then he stated that in September or October, 1972, Harold Gray, along with a fellow named Frazee came to the Pine Tree Cafe in Watertown where Steve was working. At that time Frazee had two guns that he carried on

him. One was a 32 caliber, and he is not sure if the other was a 38 Special or a 357 Magnum.

BY MR. HACKETT: I think perhaps, for the record, if this witness wants to read from this, we should simply introduce it into evidence if it is material. He is referring to his notes to refresh his recollection, but he is simply reading from it, and this is second best evidence.

Q That is true. Could you look at your notes and refresh your recollection sufficiently so that you can testify without reading it verbatim?

A Yes, with the exception that there a number of names that I will not be able to recall.

Q Ok, go ahead and use your notes to refreash [sic] your memory for those names.

A At this time we continued our conversation. This was in the morning of April 5. Then in the afternoon of April 5. 1973, he was again interviewed by me, along with Floyd LeVake, the State probation officer at that time. Again he was advised of his rights, and at that

[TT 104]

time he advised me that two other fellows from Minneapolis had been out to see him, and that they also had guns with them, and one of them by the name of Pianto had offered him $1000 to dispose of two bodies. And that this Pianto supposedly had two scores to make, which included two people to kill. And about four o'clock in the morning on

August 20, 1973, Steve Satter told me that this guy by the name of Pianto came back in the Pine Tree Cafe and gave him $1000 in cash, and showed him a map of where the two bodies were, and he was supposed to go out there, Steve was supposed to go out there and torch these two bodies and dispose of them. At that time Steve said he could not do that, but he did get the $1000.

Q Did he describe in what denominations the $1000 was?

A In $20 bills.

Q That was the sum and substance of your conversation with him on April 5, 1973?

A That is right.

Q Did he ever indicate that he told this story to anybody else?

A He did.

Q Who did he say he told it to?

A A party by the name of Rick Schmelling, and a Don Waba, both of Watertown.

Q Did you ever ask him if he knew how or when Pianto killed these two individuals?

[TT 105]

BY MR. HACKETT: I object to that as being immaterial.

BY MR. JANKLOW: I will withdraw the question and rephrase it.

Q Did Steve Satter ever state to you that he knew how these two individuals had been killed?

A I will have to look at my notes here.

Q This is on the April 5 meeting.

A I would have to say no at this time.

Q Mr. Peterson, did you have any further conversation with Steve Satter on April 5, 1973, or was that it?

A Yes, I did.

Q Is that relevant to these two bodies?

A It is was not.

Q It had to do with some other matters?

A Right.

Q All right, we won't go into that. The next time you had a conversation with Steve Satter relative to the two bodies was what date?

A April 11, 1973.

Q Where did that conversation take place?

A It took place at Sioux Falls, South Dakota.

Q Who was present outside of yourself and Steve Satter?

A Chief of Police Al Freesemann and Leo Brown.

Q Will you please tell me what you asked him and what he

[TT 106]

said relative to the two bodies in the conversation on April 11, 1973, at Sioux Falls?

A He stated that he had killed the two fellows, named them as Kent Engle and Jerry Bowling; that he had shot them in a trailer house that belonged to them at Lake Pelican, South Dakota; that he had thrown their bodies out through a window of the trailer house into a car, and had taken them out to a spot south and east of Kranzburg, South dakota [sic], drugged them some distance and placed them by a rock pile and took some of the rocks and placed over the bodies.

Q Did he indicate to you whose car was used to transport the bodies from the trailer house to Kranzburg?

A Yes, he did.

Q Whose car was that?

A That was his sister Mary Ann Satter's blue Ford, four-door car.

Q Did he also give you, on April 11, 1973, and [sic] written statement over and above the oral statement?

A He did.

Q Was this in addition to the oral conversation you had?

A It was.

(Exhibit 21 marked--written statement)

Q I will hand you what has been marked as Exhibit 21 for identification, and ask you if you recognize that document, sir?

[TT 107]

A I can.

Q What is it?

A This is the voluntary statement that Steve Satter gave Chief of Police Al Freesemann and myself.

Q Does the first page bear any signature?

A It does.

Q What signatures does it bear?

A It bears the signature of Steve Alan Satter and witnesses Al Freesemann and Delbert Peterson.

Q You are the Delbert Peterson who was a witness?

A That is right.

Q And who is Al Freesemann?

A He is the Chief of Police at Watertown, South Dakota.

Q Is there any statement made by Steve Satter on page one of that document?

A No, there is not.

Q Is it just the Miranda warning again?

A That is right.

Q Then is there a second page to that document?

A Yes, there is.

Q Will you please describe what the second sheet consists of?

A The second sheet here consists of the voluntary statement given to Chief

Freeseman and myself relative to the killing of Kent Engle and Jerry Bowling.

[TT 108]

Q Is the statement handwritten or typed?

A It is typed.

Q Who typed it?

A I did.

Q Was it typed at the time the statement was taken?

A That is right.

Q In the presence of the defendant Steve Satter?

A Right.

Q Are there any errors that you put in your typing?

A Quite a few.

Q How are those errors corrected?

A By the initials of Steve Satter.

Q Does that document bear any signatures?

A Yes, it does.

Q What signatures does it bear?

A It bears Steven Alan Satter's signature in two places, and is also witnessed by Al H. Freesemann and Delbert J. Peterson.

Q At the time you prepared that document, did you make any copies?

A I did.

Q Did you give copies to anyone?

A I did.

Q Will you please explain to the court and jury the distribution of those copies.

[TT 109]

A The original copy of this statement was left with Chief Al Freesemann at his office, a copy of this statement was given to Steven Alan Satter, and myself a copy.

Q What color is the copy given to Steve Satter?

A It is either pink or yellow, one of the two.

—

Q So the copies are different colors?

A Right.

BY MR. JANKLOW: At this time, Your Honor, I would like to offer in evidence States Exhibit 21.

BY MR. HACKETT: No objection.

BY THE COURT: Exhibit 21 will be admitted into evidence.

Q So I can be sure the statement you took on April 11, 1973, is Exhibit 21, where was that taken?

A In the Chief of Police's office in Watertown, South Dakota.

Q So this was after you arrived back from Sioux Falls?

A That is right.

Q At that time, or on that date you received two statements, an oral statement in Sioux Falls, and a written statement in Watertown?

A That is right.

Q Did you have any further conversation with Steve Satter on April 11, 1973?

A Nothing, with the exception of what he had already told us.

[TT 110]

Q The discussion you had with the defendant in Sioux Falls on April 11, 1973, during the course of that discussion did the defendant tell you whether or not he took any pistols with him when he went over to the house trailer?

A He did.

Q How many pistols did he say he took with him?

A He said he had a 22 caliber and a 25 caliber.

Q In other words, he said he carried two pistols with him?

BY MR. HACKETT: Just a minute, we move to strike that for the purpose

of objection. The written evidence which has been introduced in evidence is the best evidence and it speaks for itself; and we object to that as immaterial, incompetent, and irrelevant.

BY MR. JANKLOW: It is not, Your Honor, as far as I---

BY THE COURT: I haven't had an opportunity to read the statement. May I see it?

BY MR. JANKLOW: It is not the same, Your Honor, the stories differ.

(Counsel approach the bench)

A As I understand correctly, on this statement there is just one 22 caliber pistol involved.

Q Did he ever tell you about having a 25 caliber pistol?

A Yes, he did.

Q Directing your attention to the interview in Sioux Falls,

[TT 111]

where the Chief and yourself and Bud Brown and the defendant were there, did you prepare notes for your files of that conversation also?

A I did.

Q Do you have those files with you?

A I do.

Q Would they refresh your memory better as to what Steve Satter told you on that day?

A Yes.

Q Now this is not the written statement, Exhibit 21, this is the first conversation?

A Right.

Q Did he say what time he went to the trailer house on August 20, 1972?

A Yes, he did.

Q What time did he say he went?

A As I recall, possibly 9:30 in the morning of August 20.

Q What day of the week was that?

A Sunday.

Q Did he say whether or not he carried any pistols with him?

A He did.

Q How many pistols did he say he carried with him?

A At one time he told me he carried a 22 and a 25 caliber.

Q Did he tell you why he went to the trailer house that day?

A He did.

[TT 112]

Q What did he say was the reason?

A He was angry at the two fellows in the trailer house, Jerry Bowling and Kent Engle.

Q Did he tell you why he was angry?

A He told us that he was angry at these two fellows for the abuse that one of them, namely Kent Engle, had given his sister Mary Ann.

Q Did he say anything about pictures?

A Yes, he did.

Q Tell the court and jury what he said about the pictures?

A He stated that he was also angry at them for the nude pictures they had of his sister Mary Ann.

Q Have you personally ever seen those pictures?

A No, I haven't.

Q Did he ever state to you exactly why he shot these individuals, in that conversation in Sioux Falls?

BY MR. HACKETT: Once again, Your Honor, that is all in writing; I think that is second best evidence.

BY THE COURT: I believe you are referring to another conversation, at another time?

BY MR. JANKLOW: Yes, the conversation in Watertown is Exhibit 21. This is the Sioux Falls conversation.

BY THE COURT: You may answer, but you are

[TT 113]

restricted to that conversation in Sioux Falls.

A Will you repeat the question, please?

Q Did he ever state to you what the reason was, why he shot Kenny Engle and Jerry Bowling?

BY MR. HACKETT: That is objected to as having been asked and answered.

BY THE COURT: You may answer. I don't believe that has been.

A He did.

Q Will you state to the court and jury what he said?

A He stated that when he was out of the trailer house, he came into the trailer house and he saw the opportunity was ripe to kill them and---

BY MR. HACKETT: Just a minute. That is objected to as not responsive.

BY THE COURT: Will you restate the question for clarification, please?

Q Did he state the reason that he was giving as to why he shot Kent Engle and Jerry Bowling?

A He did.

Q Will you state to the court and the jury the reason that the defendant gave for shooting those two individuals.

A Because he was angry at them for the way they had been treating his sister.

[TT 114]

BY MR. JANKLOW: The State has no further questions.

EXAMINATION BY MR. HACKETT:

Q As I understand it, Mr. Peterson, Exhibit 21, you prepared that and you typed it up?

A I did.

Q It mentions only one gun, did you ask Mr. Satter about another gun when you typed that up?

A No, this was in a later conversation.

Q I understand that, but did you ask him about another gun then?

A I don't recall.

Q Did you know Mr. Engle or Mr. Bowling?

A No, I did not.

Q Did you ever do any work in connection with their illegal activities?

A I did.

Q In connection with both Mr. Engle and Mr. Bowling?

A That is right.

Q What name did you know Mr. Engle by, if you knew him by more than one name?

A Kent Wright.

Q So you knew this one fellow by two names, is that right?

A I never met the man personally, but we were checking on both names, that is right.

Q What were you checking?

[TT 115]

A We were checking relative to some burglaries in this area.

Q Is it my understanding, Mr. Peterson, that when you had this conversation in Sioux Falls, was that on April 11?

A Right.

Q Did Steve tell you at that time that those fellows had been abusing his sister?

A I am sure he did. We have talked to him numerous times.

Q Did he tell you how they were abusing her?

A He did.

Q What did he say about that?

A He stated that they had beat her up, and also that they had tied her one time in the trailer house.

Q Did he tell you that they had kept her there over an extended period of time like that?

A He did.

Q Did he tell you that is when they took these pictures?

A No.

Q Do you know when the pictures were taken?

A No, I don't.

Q In any event, that was the reason he went there that morning, is because he was mad, is that your testimony?

A That is what he told me.

Q Isn't it a fact, Mr. Peterson, that he told you he went there to get those pictures?

[TT 116]

A That might have been in the conversation that he was there for that reason, but I specifically recall him saying that he was angry at them.

Q Is that all you recall, Mr. Peterson? Don't you recall the reason why he went there, other than that?

A I would have to look at my notes to--

Q --Well, do that.

A ---- I found the question you asked. This is the interview on April 11, 1973,

where Steve Satter stated that on 9:30 on the morning---

Q --- My question, Mr. Peterson, is didn't he tell you he was going there to get the pictures?

A Yes, according to my report here.

Q Fine. Then your answer to that is that the reason he went there is because he was angry and he went after the pictures, is that correct?

A That is right.

Q Then calling your attention, Mr. Peterson, to this Exhibit 21, which is the confession, the first page is for all practical purposes the Miranda warning once again, is it not?

A Yes.

Q Did Steve Satter give that to you voluntarily?

A He did.

Q Did he ever ask to have a lawyer present?

[TT 117]

A No.

Q As a matter of fact, he gave you this statement about the same time he was clearing up all of his burglaries, the whole business, was he not?

A That is right.

Q You mentioned the name Schmelling, is that right?

A Yes.

Q Who is that?

A He is a local juvenile.

Q Wouldn't it be more accurate to describe him, not as a local juvenile but as a local burglar?

BY MR. JANKLOW: I object to that as improper questioning and it calls for a conclusion not only by the witness but by counsel.

BY THE COURT: Sustained.

Q Were you investigating Mr. Schmelling about the same time in connection with burglaries?

A I was.

Q And in truth and in fact, wasn't Mr. Schmelling implicated in numerous of these burglaries when Mr. Satter made a clean breast of things?

A That is right.

Q Who is this Waba that you mentioned in your testimony?

A A local citizen here in Watertown.

Q Were you investigating him too?

[TT 118]

A No.

Q To your knowledge was he investigated by the local police department in connection with some other offenses?

A Mr. Waba?

Q Yes.

A I have no knowledge of that.

BY MR. HACKETT: I have no further questions, Your Honor.

BY MR. JANKLOW:

Q Mr. Peterson, you indicated that Steve Satter was making a clean breast of things. Did he make a clean breast of everything?

A I felt he did.

Q What does that include, a clean breast of things?

A Cleaning up all crimes that he has been involved in.

Q What was that?

BY M.R [sic] HACKETT: I object as being immaterial.

BY MR. JANKLOW: It was brought out by counsel. I did not go into it on direct examination.

BY THE COURT: I think that is sustained. It may bring in prejudicial matters.

Q Mr. Hackett asked you if you were investigating Engles and Bowling in reference to other activities in the community. You mentioned those two individuals; were you investigating any other individuals along with

[TT 119]

those two in the same investigation?

A I was -

Q Who was that?

A Steve Satter.

Q That is the defendant here?

A It is.

Q Was he being investigated on the same matters that Mr. Engles and Mr. Bowling were being investigated on?

A He was.

BY MR. JANKLOW: I have no more questions.

BY MR. HACKETT:

Q Just so that I have it clear, Mr. Peterson, in connection with that question, would it be correct to say that you were investigating Mr. Bowling, Mr. Satter, Mr. Engles and Mr. Schmelling in connection with the same matter.

BY MR. JANKLOW: I object to that, Your Honor, that is an improper statement of counsel,and [sic] a misstatement of the evidence. He never said he was investigating Mr. Waba. (sic)

BY THE COURT: He may answer. It isn't that important. I don't think it will prejudice anyone.

A Not Schmelling on the same ones.

Q In connection with other burglaries then?

A Right.

BY MR. HACKETT: I have no further questions.

[TT 120]

BY MR. JANKLOW:

Q Mr. Peterson, the story in any of the statements of fact that Steve Satter the defendant ever gave you, was it inaccurate?

A It was.

Q On how many occasions did he give you inaccurate information?

BY MR. HACKETT: That is objected to. Was that prior to the time the written statement was taken?

BY MR. JANKLOW: Subsequent to the time the written statement was taken.

BY THE COURT: Will you restate the question, please?

Q I will state it another way. Did he ever send you on any wild goose chases?

A He did.

Q Can you state on how many occasions he sent you on wild goose chases in his statements to you?

A It would be an estimation of possibly six or eight.

Q Would they involve major incidents or offenses?

BY MR. HACKETT: Now this is objected to, it has no probative value in this matter.

BY THE COURT: Overruled. He may answer. I think it has.

Q Did it involve major incidents or criminal offenses?

[TT 121]

A It did.

Q Specifically?

A Yes.

Q All right, specifically what?

BY MR. HACKETT: Same objection.

BY THE COURT: Overruled.

A That some more bodies were hidden down by St. Paul, Minnesota; a large jewelry store burglary in St. Paul, Minnesota; and burglaries---

Q --Anything involving any kidnapping activities?

A Just proposed. And then a burglary at Madison, South Dakota.

Q These were all things that you further developed were untruthful in respect to what he told you about these activities?

A Yes.

BY MR. JANKLOW: That is all I have.

BY MR. HACKETT:

Q In that connection, Mr. Peterson, do you believe Exhibit 21 to be truthful?

A I do.

BY MR. HACKETT: I have no further questions.

BY MR. JANKLOW: The State has no further questions.

BY THE COURT: You may step down, Mr. Peterson.

(Witness excused)

[TT 122]

STEVEN ALAN SATTER,

being first duly sworn, testified as follows:

EXAMINATION BY MR. HACKETT:

Q Will you state your name for the record?

A Steven Alan Satter.

Q How old are you Steve?

A Twenty-six.

Q What is your present address?

A State penitentiary, Sioux Falls.

Q Why are you in the penitentiary, Steve?

A For burglary in the third degree.

Q Steve, where did you live in the month of June, 1972?

A At my parent's home in Watertown.

Q Were you employed at that time?

A Yes, I was.

Q Where were you working?

A At Barkley Truck Lines, and the Pine Tree Cafe.

Q What sort of work did you do at Barkley Truck Lines?

A Furniture moving mostly, and freight moving.

Q And what work did you do at the Pine Tree Cafe?

A I was a cook.

Q Did you have any other occupations at that time?

A Yes, I did.

Q What was that?

A I was a burglar.

[TT 166]

Q Were you working alone, or with other people?

A Both.

Q Who, specifically, were you working with in connection with these burglaries?

A Kent Engles and Jerry Bowling.

Q You have just referred to one of those people as Kent Engles. Do you know what [h]is [sic] actual name was?

A I believe it was Kent Engles.

Q What other names did you know him by?

A Jerry Wright, Kenny Wright, Kenny Lee, Jerry Lee, -there were numerous names.

Q During this period of time, where were you and these fellows committing these burglaries?

A All over the State of South Dakota, and some in Minnesota also.

Q During this period of time, did all three of you carry guns?

A Yes, sir.

Q As I understand it, during this period of time, was your sister going with one of these fellows?

A Yes, she was.

Q Which one of them?

A Kent Engles.

Q Calling your attention specifically to the summer of 1972, did you and these fellows--did some problems develop between you?

[TT 167]

BY MR. JANKLOW: I object, Your Honor, the last three questions, including this one, are really leading questions. I think it would be better if the witness would testify, not counsel

BY THE COURT: Try not to lead th witness, Mr. Hackett. Rephras your question.

BY MR. HACKETT: Your Honor, tha question can be answered yes or no That is hardly a leading question.

BY MR. JANKLOW: That is what leading question is, Your Honor You get the answer.

BY THE COURT: You may continue.

Q What problems developed between yo fellows in the summer of 1972?

A There were problems of Kenny and Mar not getting along with each other.

Q Can you explain those just briefly t the jury?

A Well, as I understand it, my siste wanted to be finished with Kenny and h had other ideas.

BY MR. JANKLOW: I move that tha answer be stricken as hearsay, a

he understood it, unless a proper foundation is laid.

BY THE COURT: Will the reporter read the answer.

(Answer read by reporter)

BY THE COURT: It may be stricken. And I expect

[TT 168]

you may want to ask him other questions as to his own knowledge.

Q What specific problem existed between your sister and Kenny Engles?

A Specifically they just couldn't get along with each other.

Q So that we get this out of the way, how big was this fellow Engles?

A Maybe six feet, 170 or 180 pounds.

Q How big was Mr. Bowling?

A Jerry was slightly shorter, about 5-10, and I would say maybe 160 pounds.

Q What if anything happened early in July of 1972, between your sister and Mr. Bowling that effected you?

A I don't know if I can answer that without hearsay. You mean just what I know of my own personal knowledge?

Q Yes, that is exactly what I mean.

A I really can't answer that without saying that somebody told me this, and somebody else told me that.

Q Did your sister disappear for a period of time in July, 1972?

A Yes, she did.

Q Did you subsequently learn where she had been?

A From her, yes.

Q Where had she been?

[TT 169]

A She said she was out at the trailer.

BY MR. JANKLOW: I have no objection to that so long as it is

shown that she said it, not that it is true.

BY MR. HACKETT: I have no objection to that, Your Honor.

Q Did your sister also relate at that time that some pictures had been taken of her?

A Yes, she did.

Q Did you try to secure those pictures back from Mr. Engles?

A Yes, I did.

Q Were you able to do that?

A No, sir.

Q Why not?

A He denied their existence.

Q Did you question Mr. Engles about this on more than one occasion?

A Yes, sir, on several occasions.

Q Did you later find some pictures in Mr. Engles' car?

A Yes, I did.

Q Under what circumstances?

A I was searching his car.

Q For what?

A For the pictures primarily, we were just searching it.

Q Then at what point in time did you make this discovery?

[TT 170]

A August 19, 1972.

Q What, if anything, did you do then?

A I went looking for Kenny.

Q Were you able to locate him on that particular day?

A No, sir.

Q Why not?

A He had gone to a night club in Groton South Dakota.

Q Now, Mr. Satter, did you continue your search on August 20, 1972?

A Yes, sir, Idid [sic].

Q Where did you specifically look for Mr. Engles?

A At the trailer.

Q How did you get to the trailer?

A I walked.

Q Can you tell the jury where this trailer was located?

A It was located east of the Doghouse, which is pretty well known night club.

Q Is that located on Lake Pelican?

A Yes, it is. On the north side.

Q Steve, did you take a gun with you that morning?

A Yes, sir, I did.

Q What kind of gun was it?

A A 22 revolver, target revolver.

Q Why did you take a gun, Steve?

A Well, I was a little outclassed if it came to a fight

[TT 171]

with Kenny. I wanted it for protection.

Q Were you afraid of Mr. Engles?

A To a degree, yes.

Q When you went there, did you inter
[sic] to shoot anybody?

A No, sir.

Q At that point did you have persona
knowledge that both Mr. Engles andM
[sic] Bowling carried guns?

A Yes, sir, I did.

Q Now I want you to tell the jury, to t
best of your memory, about the time y
arrived at the trailer.

A I would say it would be about nine,
nine-thirty in the morning.

Q What did you do when you first arriv
there?

A I don't understand.

Q What did you do when you got to t
trailer?

A I went in.

Q Did you knock on the door?

A No, sir.

Q Why not?

A I never have.

Q Had you been there often?

A Very often, yes.

Q Did you ever knock on the door?

A Never did.

Q When you entered the trailer, was there anyone else present?

[TT 172]

A Yes.

Q Who?

A Kenny Engles.

Q Was Bowling there at that time?

A He was but I couldn't see him.

Q So you didn't know Mr. Bowling was in the trailer.

A No, sir. He shouldn't have been there.

Q Why not?

A I was under the impression that he was with a friend of his.

Q Where was Mr. Engles when you entered the trailer?

A He was seated at the kitchen table.

Q Can you tell the jury what he was doing at that particular point in time?

A He was drinking coffee.

Q Did you close the door behind you?

A Yes, sir.

Q What, if anything, did you say to Mr. Engles?

A I told him I knew he had lied about the pictures.

Q Did he reply to that?

A He denied it once again.

Q After he denied the picture deal, what did you do then?

A I showed him the pictures I found in his car.

Q Did you tell him where you had found them?

A Yes, sir, I did.

[TT 173]

Q What was the subject matter of those pictures?

A My sister.

Q With or without clothing?

A Without.

Q Did Mr. Engles have anything to say about the situation at that point?

A No, he told me pretty much that the pictures were between him and Mary and none of my business, and he stated that Mary Ann had posed for the pictures and there wasn't anything wrong, and nothing to be concerned about.

Q In your own words, what happened next?

A As he was saying this, he walked into the living room area, there was no separation between, and he set the coffee cup down and we had further words and he drew a gun.

Where did he get this gun?

A Out of his right hip pocket.

Q Where was he standing in relation to some piece of furniture, or something, so you can describe to the jury where he was when this happened?

A He was about midway between the west wall of the living room.

Q Steve, where was the kitchen table located generally, where Mr. Engle was seated when you came in. Can you show on this mockup here.

[TT 174]

A It would be this area here.

Q When he got up and walked, where did he go?

A He got up from here and walked over to here, approximately right here.

Q What was located approximately right there?

A A television set.

Q Was there more than one television set in the room?

A There were about four.

Q Where were you standing at the point when Mr. Engle drew his gun?

A I was standing right about here.

Q At the point when Mr. Engle drew his gun, where was your gun?

A In my belt.

Q What happened then?

A I drew my gun and shot Kenny.

Q Now at that point in time, did you actually believe Mr. Engle was going to shoot you?

A Yes, sir, I did.

Q How many times did you shoot, Steve?

A I am sure twice.

Q What happened then? Tell the jury in your own words.

A Kenny fell down and I went over there, and I was checking for a heartbeat and I

couldn't feel any. My own was pounding too hard, I couldn't tell if he had one or not,

[TT 175]

and at this point Mr. Bowling came out of the bedroom directly behind the wall.

Q Did you have any warning that there might be someone else there?

A No, sir.

Q Did you hear any noises?

A I did hear a noise then, yes, but prior to that, no.

Q Where was Mr. Bowling when you first observed him?

A Coming out of the doorway of the bedroom.

Q Tell the jury in your own words what happened?

A He came out and he had a gun down by his side. He started to lift his gun and I shot him. He shot once over my shoulder

and I shot him a second time, and as he hit the floor, I shot him a third time.

In truth and in fact, you fired three times and Mr. Bowling shot once at you?

Yes.

I take it he didn't hit you; Do you know where the bullet went?

Yes, sir, it lodged in the television set behind me.

All right. Where were you when you first observed Mr. Bowling?

I was right about here.

Where was he?

He was coming out this door over here.

[TT 176]

Where was the television set located that Mr. Bowling shot?

It would be about here.

Did Mr. Bowling say anything to you at that particular point in time?

No, sir.

Q Did you actually believe at that point in time that Mr. Bowling was going to shoot you?

A Yes, sir, I did.

Q Were you standing up or kneeling down, or what position were you in?

A I was kneeling down.

Q How far away from the door were you?

A Which door?

A The front door.

A I would say about five feet at least.

Q Ok. Now this exhibit doesn't have any door on it, but is this the approximate location of that front door?

A Yes, sir, it is.

Q Can you describe that door to the jury?

A Describe it?

Q What kind of door was it?

A Just a door, a regular door.

Q What kind of door knob or latch did it have?

Conventional type, the kind that you turn.

[TT 177]

Just a regular [d]oor [sic] knob?

Yes.

And for the record, was that door closed?

Yes, sir.

What was Mr. Bowling wearing, if you recall?

He was in his underwear.

What was Mr. Engle or Wright wearing?

Shirt and slacks.

How far away from that door were you standing when Mr. Engle drew his gun?

I couldn't really say, Bill, a matter of several steps, I suppose.

Were you facing the door or were you facing Mr. Engles?

I was facing Mr. Engles.

Q Steve, can you tell the jury how much time elapsed from the time you entered the trailer until the time you had this shootout with Mr. Engles?

A I believe not more than one minute, at the most.

Q How much time elapsed before this shootout with Mr. Bowling?

A I don't understand.

Q How much time elapsed before these series of events were completed? How long were you in the trailer?

A You mean from the time I entered until I left?

Q No, from the time you entered until the time Mr. Bowling had been shot?

[TT 178]

A Approximately one minute.

Q Now at that point in time, after Mr. Bowling had been shot, what did you do then?

A I don't understand.

Q What did you do after you shot Mr. Bowling?

A I searched the trailer.

Q For what?

A Pictures.

Q Did you find any?

A No, sir.

Q Did you do anything with the guns?

A Yes, sir, I did.

Q What did you do?

A I put them in the back bedroom in the dresser drawer.

Q Can you describe the guns?

A A 25 automatic, and a 32 revolver.

Q Which one had the revolver?

A Jerry Bowling.

Q I take it Mr. Engles had the automatic?

A That is correct.

Q Have you ever seen those guns since?

A No, sir, I have not.

Q After you searched the trailer for the pictures, what did you do, if anything, then?

A I left.

[TT 179]

Q How did you leave?

A I used a car that was parked out in front of the trailer.

Q Do you know who owned that car?

A Yes, sir, I did.

Q Had you used that car on other occasions?

A Yes, sir, I have.

Q Whose car was it?

A Gordon Gully's.

Q How did it happen that Mr. Gully's car was there, if you know?

A I later found out that Kenny had borrowed it.

Q Did Mr. Gully live in that area?

A Yes, sir, he lived right next door.

Q After you left the trailer, where did you go?

A To the Pine Tree Cafe.

Q What did you do there?

A I informed Mr. Gully that I had his car and I asked him to give me a ride up to my brother's house.

Q Did he do that?

A Yes, he did.

Q Subsequent to that time, did you return to the trailer on August 20, 1972? Did you go back?

A Yes, I did.

Q When was that?

A An hour and a half, or maybe two hours later.

[TT 180]

Q What did you go back for?

A I removed the bodies from where they were laying.

Q Where did you put them?

A In the bathroom.

Q Why did you do that?

A If someone walked into the trailer and saw them it wouldn't look too good.

Q Did you have occasion later in the day to return to the trailer once again?

A Yes, I did.

Q For what purpose?

A To remove the bodies.

Q Did anybody go with you?

A No, sir.

Q Whose car did you have?

A My sister's.

Q Did you in fact remove the bodies?

A Yes, sir, I did.

Q How did you do that, those were pretty big fellows.

A I just did it.

Q Tell the jury how you did it.

A I dragged them to the window and lowered them down into the trunk of my car.

Did you take anything else at that time?

Yes, sir, I did.

[TT 181]

What?

A television set.

Why did you take that?

Because it had a bullet in it.

What did you ultimately do with these bodies, Steve?

I just drove around looking for a place to put them.

Did you have some special place you wanted to look, or were you just looking in general?

Just looking.

Where did you eventually put the bodies?

South of Kranzburg, in the rock pile.

What did you do with the TV set?

I saved that until the next day and then I took that out to the City dump.

Did you throw it in the dump?

A Yes, sir.

Q Steve, during the course of August 20, did you do other things?

A Yes, sir.

Q Where was one of the first places you went after you left the trailer, other than the Pine Tree?

A I went to my brother's house.

Q For what purpose?

A My car was there.

Q Was that where Mr. Gully took you?

[TT 182]

A Yes, sir.

Q While you were at your brother's house, did you talk to anybody?

A Just my brother.

Q Did you tell him anything about this?

A No.

Q Where did you go after that?

A I went out to Floyd LeVake's house.

Q Who is Floyd LeVake?

A My probation officer.

Q Why were you on probation?

A For burglary.

Q Where?

A In New Ulm, Minnesota, Brown County.

Q Were you required to report regularly to Mr. LeVake?

A Not necessarily. I had monthly forms to fill out. We kept in touch.

Q Why did you go to LeVake's house on that morning?

A To tell him what happened.

Q Did you do that?

A No, sir.

Q Why not?

A I lost my nerve.

Q Where did you go then?

A I believe I returned home.

[TT 183]

Q Did you stay there at home?

A No, sir.

Q Well, where did you go when you left home?

A I went to the Pine Tree Cafe.

Q For what purpose?

A To cash a check.

Q Why did you need money at that particular point in time?

A When I first got to LeVake's house I was going to tell him what happened, and I lost my nerve, then I gave him a story about how I came out to make a restitution payment, and I neglected to bring the money, and I had to go back and get the money to pay it.

Q What doyou [sic] mean "restitution payment"?

A As a condition of probation I had to make restitution in Minnesota.

Q Were you doing that regularly?

A Yes, sir.

Q Did you take the money out to LeVake?

A Yes, sir, I did.

Q Did you tell him what you had done that morning?

A No, sir.

Q What did you do then?

A I believe I went to the City Park.

Q For what purpose?

A To think things out and decide what I was going to do.

[TT 184]

Q How long did you stay there?

A Till late afternoon.

Q When you left City Park, what did you do then? Where did you go?

A To the trailer house.

Q Is that when you removed the bodies?

A Yes, sir.

Q Steve, did you take anything from the trailer house besides the TV and the bodies?

A No, sir, I don't think so.

Q So that we have it straight, how many TV sets were located in that place?

A I believe at least four.

(Court in recess until 11:25.)

BY MR. HACKETT:

Q Steve, in connection with the burglaries in the summer of 1972, can you tell the jury approximately how many of those you participated in with Mr. Bowling and Mr. Engles?

A Offhand I would say roughly forty. It may be considerably more than that.

Q In what area did those burglaries take place?

A In eastern South Dakota and western Minnesota.

Q While you were in jail here in Watertown, did you make a clean breast of those things with the police department?

A Yes, sir.

Q As a result of that you are now in the penitentiary for burglary?

A Yes, sir.

BY MR. HACKETT: You may cross examine.

EXAMINATION BY MR. JANKLOW:

Q May I call you Steve?

A Yes, please do.

Q Did you make a clean breast of everything in Indiana, Illinois, and Iowa too, when you said you made a clean breast of everything?

A I wasn't involved in anything in those states.

Q Did you ever live in Indiana with Engles and Bowling and your sister?

A Yes, sir. Well, no, not with Bowling.

Q With Engles and your sister?

A Yes, sir.

Q Did you ever participate in burglaries in Indiana?

A No, sir.

Q If your sister said you did, would she be not telling the truth?

A Yes, sir.

Q This isn't the first time you have been convicted of a felony either, is it, Steve?

A No, sir.

[TT 186]

Q How many times have you been convicted of a felony?

A Three other times, I believe.

Q Tell the jury when they were.

A One would have been in April, in Yankton, South Dakota, April of 1967.

Q What was that for?

A I believe that was a burglary charge, I am not sure, it may have been grand larcency.

Q Could it have been grand larceny?

A It could have been, I am not sure what the charge was.

Q The next one?

A A similar charge in Brookings; that would be, I believe, August 1, 1967.

Q That is the second one?

A Correct.

Q And the next one?

A The third one would have been in New Ulm, Minnesota.

Q When was that?

A In 1971, I believe. '70 or '71, I couldn't say for sure.

Q The next one?

A May, 1973.

Q So you have been convicted of four felonies, haven't you?

A That is correct, yes, sir.

Q Beginning back in 1967?

A Yes, sir.

[TT 187]

Q And you are how old?

A Twenty-six.

Q Twenty-six years old. When you gave your statement to Pete Peterson, of DCI, in April 11, 1973, do you remember giving him that statement?

A Yes, I do.

Q Did you tell the truth in that statement? Was that when you were coming clean?

A Yes, sir.

Q Is everything in that correct?

A No, sir.

Q So you didn't come clean that day?

A There are some discrepancies, they are not really major, minor discrepancies.

Q Will you tell the jury what minor discrepancies are that you may have made in that statement you gave?

A Could I have the statement?

Q You certainly may.

A To begin with, the one that comes to mind most, the biggest one, I suppose, would be the fact that I said in the statement that I drove out there. I did not drive out, I walked out there.

Q I see. How did you say in the statement you drove out there? Whose car did you say you used?

A My sister's.

[TT 188]

Q But that is not true, is it?

A No, sir, it isn't.

Q Will you explain to the jury why you didn't tell Mr. Peterson the truth?

A To begin with, Mr. Peterson, when that statement was taken, was asking me questions and then saying, "is that true,and is this true" and I really wasn't paying that close attention to what he was saying.

Q I see. Then in other words, that is Mr. Peterson's statement, is that what you are saying?

A No, I didn't say that now.

Q Ok. Whose statement is that, yours or Mr. Peterson's?

A Let's say it is a combination of both.

Q Did you give another statement to him the next day?

A I don't believe so.

Q On April 12, 1973, did you give another statement?

A I don't believe so, no.

(Exhibit 49 marked)

Q I would like to show you what has been marked as State's Exhibit 49, and ask you to look at that document. Does it bear any signatures?

A Yes, sir, it does.

Q Whose signatures are on that document?

A Al Freezemann's, Del Peterson's, and my own.

Q Do you recognize that signature as yours?

[TT 189]

A Yes, sir, I do.

Q Is that document dated?

A Yes, sir, it is.

Q What date is on it?

A The 12th day of April

Q What year?

A 1973.

Q I will ask you again. Did you give a statement to Delbert Peterson on April 12, 1973?

A No, sir.

Q You did not?

A This is the exact same statement.

Q Did you sign that on April 12, 1973?

A Yes, I signed that on April 12, 1973.

Q You did sign it on April 12, 1973?

A Yes, sir.

Q You testified you were making restitution payments?

A Yes, sir.

Q Are you proud of those restitution payments?

A I don't understand.

Q Well, did you feel you had an obligation to make those restitution payments?

A Yes, sir, I did.

Q Why did you have to make those restitution payments?

A It was a condition of the probation.

[TT 190]

Q Because you had stolen in the past and it had to be paid back, is that right?

A Yes, sir.

Q Did you think it was correct to pay back for stealing by stealing other things to pay it back?

A No, sir.

Q You did testify that one of your occupations was as a burglar, didn't you?

A Yes, sir.

Q So you were paying back your restitution with other things you were stealing, weren't you?

A In part, yes.

Q You wentover [sic] to the house trailer that day with the pictures you had in your possession, is that right?

A I had two pictures, yes, sir.

Q Are they the same two pictures that have been admitted in evidence here today?

A I haven't seen those, so I couldn't say.

Q Well, now, you have seen these, haven't you?

A No, sir.

Q Did you see them when your attorney gave them to me yesterday?

A I never looked at them, no. I glanced at them

Q Did you know they were in your attorney's file?

A Not until yesterday.

[TT 191]

Q Are those the pictures?

A They are pretty much the same, I wouldn't say they are exactly.

Q What did you do with your pictures?

A I destroyed them.

Q So there were more than two pictures?

A Yes.

Q Where did you destroy them?

A In City Park,at [sic] the lake.

Q When did you destroy them?

A That afternoon, the afternoon of August 20.

Q How did you destroy them?

A I believe I tore them up and threw them down in the toilet out there.

Q Do you believe, or did you do that?

A I am pretty sure that is what happened.

Q Do you remember doing that?

A Vaguely, yes.

Q Which toilet?

A I couldn't say.

Q How long have you lived in Watertown?

A Most of my life.

Q You heard Mr. Lindberg testify about you coming out there one day to help search for a gun?

A That is correct.

[TT 192]

Q That wasn't the gun you used to kill these two men, was it?

A No, sir.

Q That was the gun that you told the officers was involved with the killing of the Custer policeman? Wasn't it?

A That is correct.

Q So when you cooperated with the officers in trying to find the gun, that wasn't the gun that was used in this killing, was it?

A No, sir.

Q That was a different incident?

A That is correct.

Q What did you do with the gun that was used in the killing of these two individuals?

A My brother took it away from me.

Q Took it away from you?

A That is correct.

Q Which brother?

A My oldest brother Al.

Q Why did he take it away from you?

A He didn't want me to have it.

Q Why?

A I don't know, I didn't ask him. I wasn't about to argue with him.

Q I think you testified that you and Kenny and Jerry always

[TT 193]

ran around with guns, is that correct?

A Not always, but a greater percentage of the time, yes.

Q So you figured they were probably armed when you went over to the trailer?

A Not really, no.

Q Why not?

A It was Sunday morning, and at their own house, there was no reason to be.

Q Had you ever had an argument or disagreement with these fellows before?

A Yes.

Q Had you ever carried a gun around with you before for self-defense or self-protection?

A Not for that reason.

Q Why? Was there something unusual about this particular day, August 19,1972? [sic]

A I thought the situation had deteriorated sufficiently that tempers would be shorter than normal.

Q So, in other words, you expected some trouble when you went over there, didn't you?

A I knew the possibility existed, yes.

Q You felt there was sufficient possibility that you took your gun with you, didn't you?

A Well, I knew if it was a barehanded fight, I had no chance.

[TT 194]

Q In other words, you were not prepared to fight with bare hands if it came to a fight, were you?

A No.

Q You were going to go to the gun?

A I would have used the gun merely for self-defense, not to shoot an unarmed man.

Q I see. Did you state you shot one of these men in the back of the head?

A That would be Jerry. I shot him when he was on the floor.

Q In the back of the head?

A I guess.

Q Why did you shoot a man that you had already shot twice----how many times had you shot him before that, twice?

A I believe so.

Q Why did you shoot him, after you had already shot him twice, why did you shoot him a third time in the back of the head?

A I just wasn't thinking.

Q You weren't thinking. You were thinking enough to shoot him in the back of the head, weren't you?

A You don't think in a gunfight, you react.

Q How many gunfights have you been in?

A Enough.

Q How many is enough?

A Two, that I can think of.

[TT 195]

Q Where were the other gunfights you have been in?

A In Nebraska and INdiana. [sic]

Q What gunfight were you in,in [sic] Nebraska?

A With the sheriff.

Q With the sheriff? Did anybody get shot-up there?

A No, sir.

Q What about Indiana? How many gunfights were you in there?

A One.

Q What happened there?

A It was an attempted armed robbery.

Q By you?

A No, sir. on me. [sic]

Q On you?

A Yes, sir.

Q Was there a shoot-out there?

A Yes, sir.

Q How many shots were fired?

A I have no idea.

Q Did you empty your gun?

A I couldn't say.

Q Did you have any right to go out to that trailer that day and walk in without knocking?

A Only that was my habit, I never knocked on that door.

Q When you go to someone's house expecting trouble, do you walk in without knocking normally?

[TT 196]

A No.

Q Have you ever done that before?

A No, sir.

Q Would it be fair to call you a trespasser that day when you went in without knocking?

A No, I don't believe so.

Q Why?

A Because I was in the habit of going out there, almost on a daily basis.

Q When was the last time you were out there before?

A I imagine the night before, the afternoon before.

Q You knew they had the pictures then, didn't you?

A Yes, sir, I did.

Q Were you on bad terms with them then?

A I was a little hot, yes, sir.

Q You didn't carry a gun that day, did you?

A I couldn't say.

Q Would it be fair to say that there was ill will between you and Kenny Engles?

A Would you define ill will?

Q You understand the word ill will.

A Not as you used it here, I don't.

Q Well, what is your definition of ill will?

A Well, say a disregard.

Q Well, did you have ill will against Kenny Engles according to your definition?

[TT 197]

A I was mad at him.

Q Did you hate him?

A No.

Q Did you have spite against him?

A No, I was just angry with him.

Q You were angry, and you were bound and determined to go out there and settle that, weren't you?

A Yes, sir, I wanted those pictures.

Q And if you didn't get them, you were prepared to do what was necessary to get them, weren't you?

A No, sir.

Q Did you hear the testimony of Mr. Waba in this courtroom yesterday?

A I did.

Q Was he telling the truth?

A No, sir.

Q He lied?

A He did.

Q Do you know of any reasons he had to lie?

A He had no reason. I don't think so.

Q Did you talk to Mr. Waba about this case?

A Yes, sir, I did.

Q Will you please tell the jury your version of what you told Mr. Waba?

A I told Mr. Waba pretty much what I stated today.

[TT 198]

Q You didn't tell him that Kenny was walking away towards the gun and you shot him in the back of the head?

A No, sir.

Q Can you remember any other points where he didn't tell the truth?

A I believe he mentioned something about burying the bodies and digging them up again.

Q That was a lie also?

A Yes, sir, it was.

Q But you have no idea why he should lie against you?

A Oh, I have some ideas, but I have no definite knowledge, no.

Q How long have you know him?

A All my life.

Q Have you ever had any trouble with him?

A Many times.

Q What kind of trouble?

A Oh, a few fights in highschool, [sic] and things of this nature.

Q How long ago were you two in high school together?

A 1965.

Q So that is nine years ago?

A Yes.

Q Any trouble since then?

A No, sir.

[TT 199]

Q Did you ever tell anybody that if you got out of this mess you would take care of Rick Schmelling?

A No, sir.

Q Do you know Jack Stone?

A Yes, sir, I do.

Q Did you ever talk to him?

A Yes, sir, I did.

Q Was it in the jail at Watertown, South Dakota?

A It could have been, yes.

Q Was it?

A I talked to him there, yes.

Q Did you ever talk to him about Rick Schmelling and rubbing him out if you ever got out?

A Not seriously, I don't believe I did, no.

Q Did you in jest?

A I think I made the remark to him that I wasn't too happy with Mr. Schmelling.

Q Why weren't you too happy with Mr. Schmelling?

A He turned State's evidence.

Q I see. Did you hear the testimony of the sheriff?

A I did.

Q Was he lying too?

A No, sir.

Q So he told the truth?

A He did.

[HCT 200]

Q In other words, you lied to the sheriff when you told him your story, the hypothetical?

A That is correct.

Q Will you please explain to the jury why you invented that tale for the sheriff?

A To get out of trouble, mostly.

Q You knew you were in trouble, didn't you?

A Well, of course.

Q When you pulled those triggers you knew you were in trouble, didn't you?

A I did.

Q That is why you hid those bodies, didn't you?

A That is correct.

Q That is why you went all the way out to hide them in a place where they could possibly never be found, didn't you?

A That is correct.

Q With respect to what has been marked Exhibit 18, where you see this red circle, is that the correct place where you hid those bodies?

A I believe so, yes.

Q Did you ever take Rick Schmelling out to where those bodies were at?

A Yes, sir, I did.

Q You were worried that he squealed on you about that, weren't you?

[HCT 201]

A Yes. Well, I knew he had, there was no sense in worrying.

Q Do you know Bud Brown?

A Yes, sir, I do.

Q The fellow from Sioux Falls?

A Yes.

Q Did you ever lie to him about what happened in these cases?

A Yes, sir.

Q And you have lied to Mr. Peterson, right?

A Yes, sir.

Q You have lied to the sheriff?

A Yes, sir.

Q Waba lied against you?

A Yes, sir.

Q Did you have any trouble with Jerry Bowling?

A Nothing serious, no.

Q You didn't even think he would be there, did you?

A No, sir.

Q You had no quarrel with him at all?

A None at all.

Q Yet you killed him, didn't you?

A Yes, sir.

Q In his house, in self-defense?

A Yes, sir.

[HCT 202]

Q You went there with a gun?

A Yes, sir.

Q Because you were mad at the guy he lived with?

A That is correct.

Q Where did you get this invention of DeLucci doing the killings?

A That is just a fabrication on my part.

Q Why do you fabricate like that? Why did you fabricate that story?

A Mostly to beat the rap.

Q To beat the rap? Are you fabricating here today to beat the rap?

A No, sir.

Q That is all true?

A Yes, sir.

Q So help you,God [sic]?

A So help me God.

Q Who is this Pianta?

A A gentleman I know in Indiana.

Q A guy you know in Indiana?

A That is correct.

Q Why did you say he did the killing?

A I figured it was a name they wouldn't be able to find.

Q So you were still trying to beat the rap?

A That is correct.

[HCT 203]

Q When did you decide to quit trying to beat the rap?

A On April 11.

Q Was that when you told Mr. Peterson the story that you had just one lie about the car?

A That is correct.

Q But you haven't told anyone any stories since then either, have you?

A I don't understand.

Q You haven't done any talking to any law-enforcement officers since then either, have you?

A I believe I have.

Q Who was that?

A I believe I talked to Pete after this, haven't I?

Q But that had nothing to do with this case at all, did it?

A I couldn't say for sure.

Q How many times have you thrown guns in the water?

A Once.

Q Didn't you take the officers or sent them to different lakes to look for guns?

A Only once.

Q Only one lake or only one time?

A One lake.

Q You don't deny that the two individuals you killed were Jerry Bowling and Kent Engles, do you?

[HCT 204]

A No, sir.

Q Also known as Kenny Wright?

A Yes, sir.

Q And you admit that it was in Codington County, South Dakota ,[sic] where their house trailer was located and where you shot them, don't you?

A Yes, sir.

Q And you disposed of the bodies in Codington County, South Dakota, didn't you?

A Yes, sir.

Q And you don't deny that those fragments that have been admitted in evidence, exhibits 22 and 23, are the bullets that came from their heads, do you?

A No, sir.

Q Was there any blood on the floor of that trailer?

A I couldn't tell.

Q Did you wash any blood off the walls?

A Yes, sir, I did.

Q Whereabouts? Which walls? Will you please show the jury which wall you washed blood off of?

A I believe it would be here, and this corner right here.

Q Was there any blood in this area?

A There was a plastic covering that ran the length of that hallway and there was blood on the plastic covering.

Q But no blood got on the rug?

[HCT 205]

A I couldn't say, it was a red rug.

(Exhibit 50 marked)

Q I show you what has been marked as Exhibit 50, and ask you if you can identify that picture?

A Yes, I can.

Q Would you please explain what that picture is?

A It is the hallway of the trailer house, looking east.

Q That furniture shown in that picture, is that the same furniture that was in the trailer house when you were there, or is that different furniture?

A It is different furniture.

Q But it is the same trailer house?

A I am sure it is.

Q Drawing your attention to these areas that I am circling in blue, does that fairly and accurately portray the trailer house, minus the furniture?

A Yes.

BY MR. JANKLOW: State would offer in evidence Exhibit 50.

BY MR. HACKETT: For what purpose, Counsel?

BY MR. JANKLOW: It is relevant. He has identified it as the place where the killing took place.

BY MR. HACKETT: No objection.

BY THE COURT: Exhibit 50 will be received.

Q Within those areas, was there any blood on the floor of

[HCT 206]

that house trailer when you walked out the last time you have ever been in it?

A I couldn't say.

Q But you did clean the blood off the walls?

A That is correct.

Q Would you explain to the jury why you washed the blood off the walls?

A So it wouldn't be seen.

Q Why didn't you want it to be seen?

A Well, it would give rise to speculation that something might have occurred there.

Q That you might have done something wrong?

A Yes.

Q When you went there you knew you might have to kill them, didn't you?

A No, sir.

Q You didn't know that?

A No, sir.

Q You were going to shoot to wound, is that what you planned to do?

A I didn't intend to shoot at all.

Q Why did you take the gun?

A For self-protection.

Q I see. But if you had to shoot for self-protection, did you intend to shoot to kill?

[HCT 207]

A I don't know--again that is impossible to answer.

Q Are you a good shot, Steve?

A Yes, sir.

Q Expert, aren't you?

A I wouldn't say expert, I am a good shot.

Q You hit what you aim at, don't you?

A Usually, yes.

Q You have done a lot of shooting?

A Yes, sir.

Q You didn't miss with any of those bullets that day, did you?

A No, sir.

Q You hit every one in the head?

A Yes.

Q Were you backed up against the wall so you couldn't get away when you started shooting?

BY MR. HACKETT: I object to that, that's not in the testimony---

BY MR. JANKLOW: ---That is statement of counsel that I copied--

BY THE COURT: --This is cross examination. He may answer. Overruled.

A No, sir.

Q You weren't backed up against the wall, were you?

A No, sir.

[HCT 208]

Q Are you sorry you had to kill Jerry Bowling?

A Yes, sir.

Q Have you ever indicated that to anyone at any time?

A I believe so.

Q Who?

A I believe to Floyd LeVake, and to my attorney Mr. Hackett.

Q You testified this morning that you, of your own idea, went over to Floyd LeVake's house, right?

A Yes, sir.

Q Isn't it true that you had missed an appointment with him and Mr. LeVake told you you had better come over the next day, which was Sunday, and when you got there his son was there, and you said you would come back later on?

A No, sir.

Q And if Mr. LeVake testified to that he would be lying?

A He would be inaccurate.

Q He would be inaccurate. You went to Mr. LeVake's house on the 20th, didn't you?

A That is correct, I did.

Q You told him you knew who burned down the Buick garage, didn't you?

A Yes, sir. That was prior to that though.

Q Pardon?

A That was prior to August 20.

[HCT 209]

Q That was prior to August 20?

A Yes.

Q So if Mr. LeVake's notes indicated that that was the conversation you had with Mr. LeVake on August 20, he would be either lying or inaccurate?

A No, sir, it is very possible that we talked about it, but that wasn't the first time we talked about it.

Q But if his notes were to indicate that that was the substance of , [sic] or biggest part of the conversation you had on the 20th, you could have had that conversation?

A Yes, sir.

Q All right. Did you go over to his house on August 19, and his son was there, and did Mr. LeVake tell you -- or did he come to see you and tell you that you had better be at his house, and did you go to his house at ten o'clock on Sunday morning?

A No, sir, I talked to Mr. LeVake on the phone from the police department, I believe that was Saturday afternoon, the preceding Saturday afternoon, and he said to see him tomorrow sometime.

Q And you went over to his house, didn't you?

A Yes, sir.

Q And his son was there?

A No, sir. His son arrived afterwards.

Q Didn't you say you would come back at twelve o'clock,

[HCT 210]

after you got there at ten?

A Yes, sir.

Q That was because somebody was there?

A No, I believe Mr. LeVake asked me to come back, I am not sure. I didn't have the money with me, so---

Q Did you come back?

A Yes, sir, Idid [sic].

Q You discussed the subject of restitution?

A Yes, sir.

Q And you also discussed the Buick garage?

A Yes, sir.

Q Did you hear the testimony of Mr. Peterson?

A I did.

Q Did you ever send law-enforcement officers on wild goose chases with stories you have fabricated?

A Yes, sir.

Q How many times have you sent officials on wild goose chases?

A I couldn't give you a number.

Q Have you bragged about the community and indicated to the officers that you know something about the Piper kidnapping in Minneapolis?

A Yes, sir.

Q That is a story you fabricated?

A Yes, sir.

[HCT 211]

Q And you have talked about the Towers Jewelry robbery in Minneapolis?

A Yes, sir.

Q That is another story you have fabricated, isnt [sic] it?

A Yes, sir.

Q And you have talked about helping someone named DeLuci, or something, bury bodies over in Minnesota, haven't you?

A Yes, sir.

Q That's another story you have fabricated, isn't it?

A Yes, sir.

Q You have fabricated lots of stories for the law-enforcement officers, haven't you?

A Yes, sir.

Q But today you are telling the truth, aren't you?

A Those were prior to April 11.

Q April 11 a new world opened up for you, didn't it, and it was called truth? Is that correct?

A Yes, sir.

Q You have also indicated that you knew something about the killing of the law enforcement officer in Custer, is that right?

A That is correct.

Q Every big crime around, you take credit for having some knowledge of it, don't you?

A No, sir.

[HCT 212]

Q Which ones did you miss?

A Well, I imagine there were some missed. There was a reason for this that you haven't gone into.

Q Pardon?

A There was a reason for bringing these stories up that you haven't gone into.

Q There was a reason?

A Of course there was.

Q Will you please explain the reason?

A I was attempting to deal myself out of a burglary charge in exchange for information.

Q Which time?

A All the times.

Q Every time?

A Yes, sir.

Q In other words, you thought if you could cooperate with them and lie to them and convince them, they wouldn't charge you with burglary, is that right?

A That is the way it goes, yes.

Q If you could talk your way out of this one today, you would be found not guilty, wouldn't you?

A I don't understand.

Q Do you understand my question?

A No, sir.

Q If your story is believed by the jury today, you would

be found not guilty, wouldn't you?

A Yes, sir.

Q And you would be innocent?

A Yes, sir.

Q Did Jerry Bowling ever before cause you any trouble?

A Once, yes.

Q What kind of trouble?

A We got into an argument.

Q Over what?

A The person he was with made a remark to me, and I retaliated with another remark, to that person, and Jerry took it as an insult to him personally.

Q So you had a disagreement?

A Yes, sir.

Q But you had no ill will toward him, did you?

A No, sir.

Q But when he came out of that bedroom with a gun in his hand, you knew he carried a gun a lot?

A Yes, sir.

Q He started to raise the gun up?

A Yes, sir.

Q And you shot him three times?

A That is right.

Q You are familiar with the rules and regulations of parolees, aren't you?

[HCT 214]

A Yes, I am.

Q You were a parolee in August, 1973, weren't you?

A I was on probation.

Q The same rules apply, don't they?

A Yes,sir [sic], they do.

Q How many years had you been on probation before August 1973, or parole?

A I think a little over a year, wasn't it?

Q Was there ever a point in time when you were authorized to carry a firearm?

A No, sir.

Q As a matter of fact, that was a violation of the rules of your probation?

A Yes, sir, it was.

Q And you were subject to being picked up and put in the penitentiary for violation of your probation if you ever carried a firearm?

A That is correct.

Q And it is also against the laws of South Dakota for a convicted felon to carry a firearm, isn't it?

A It is, yes.

Q It is also against the Federal law to carry one across the State line when you went over to Minnesota?

A Yes, sir.

Q But you did it anyhow, didn't you?

[HCT 215]

A Yes, sir.

Q But you didn't hate Kent Engles, did you?

A No, I didn't.

BY MR.HACKETT [sic]: I think that has been asked and answered.

BY THE COURT: Yes, it has.

Q Would you please explain to the jury why you never came forward from August, 1972, until April, 1973, and explained your side of why you put the bullets in those mens [sic] heads?

A Well, to do so, I would have to admit I was carrying a gun, and this was a violation of one of the probation conditions, and I thought it was best to keep it quiet instead of doing five years.

Q That is your reason?

A Yes, sir.

Q But as long as you were making up stories, it would have been just as easy for you to come forward and say you had taken the gun away from one of them, wouldn't it?

A That would not have been the truth.

Q I see. And after April 11, 1973---but you weren't telling the truth until April 11, 1973, were you? Isn't that the day of truth for you?

A That is correct.

Q So you could have told that fabricated story at any time

[HCT 216]

up until April 11, couldn't you?

A Yes, sir, I could have.

BY MR. JANKLOW: The State has no further questions, your Honor.

[HCT 217]

STATE OF SOUTH DAKOTA) SS	IN CIRCUIT COURT	
COUNTY OF CODINGTON)	THIRD JUDICIAL CIRCUIT	
STEVEN ALLAN SATTER, Applicant,	)	TRANSCRIPT OF HABEAS CORPUS PROCEEDINGS
v.	)	
HERMAN SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, Respondent.	)	CIVIL #86-1170

BEFORE: THE HONORABLE IRVIN N. HOYT,
Circuit Court Judge, at
Watertown, South Dakota,
on September 10, 1986,
commencing at 10:30 a.m.

APPEARANCES

Applicant by: MR. RICHARD BRAITHWAITE
Attorney at Law
101 South Main Avenue
Suite 222
Sioux Falls, SD 57102

Respondent by: MR. ROGER W. ELLYSON
Codington County States Attorney
Codington County Courthouse
Watertown, SD 57201

Reporter: Nancy Propst, RPR/CP

[HCT 1]

STEVEN ALLAN SATTER

called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By MR. BRAITHWAITE) Your name is Steven Allan Satter?

A That's correct.

Q And you are the petitioner in this proceeding; is that correct?

A Yes, sir.

Q And in 1973 were you convicted of murder in this courtroom?

A No, '74.

Q '74?

A Yes.

Q All right. But you are convicted of murder?

A Yes, May 10.

Q And as a result of that conviction, you were sentenced to what?

A Two life sentences, concurrent.

All right. And you are presently in the South Dakota State Penitentiary serving those sentences; is that correct?

That's correct.

And this proceeding is brought to seek to get those convictions set aside; is that correct?

[HCT 5]

Yes.

You were arrested in 1973, when?

March 1.

And where were you when you were arrested?

I was working.

Where?

Pinetree Cafe.

Here in Watertown?

Watertown, yes.

And do you remember who arrested you?

Oh, I don't know that I was arrested at that time. My probation officer, Floyd

LeVake, brought me up here to the police station.

Q So that, at that time, you were on probation and he was you PO?

A That's correct, yes.

Q And were you lodged in the local jail then?

A Yes. Yes, I was.

Q Since that time, have you continuously been incarcerated either in that jail or the penitentiary?

A Yes.

Q You were originally brought to jail for what reason?

A Possession of firearms.

[HCT 6]

Q (By MR. BRAITHWAITE) When was your first indication that the authorities thought you might have some involvement with those two deaths?

A That would have been in April 1 of 1983 [sic].

Q All right. That was approximately a month after you were originally arrested and brought to jail?

A That's correct, yes.

Q After you were arrested, did you take steps to try and employ an attorney?

[HCT 7]

A I did, yes.

Q All right.

A '73.

Q That would be the day after you were picked up?

A That's correct, yes.

Q And were you given permission to use the telephone, or how did you make your contact?

A No, there was a police officer that worked nights that used to come into the cafe quite often and I asked him to

contact Hackett -- or contact an attorney, and I also asked my sister and --

Q Ultimately, did someone come to see you?

A Yes.

Q And that was --

A William Hackett.

Q Okay. Do you know what date that was?

A That would have been March 3.

Q All right. And at that time the two of you talked about his acting as your attorney?

A Yes, we did.

Q And did he tell you what sort of monetary reward he expected for that employment?

A Yes, he did. He gave me some idea.

[HCT 8]

Q Okay. And did you feel that that was something that you could do?

A Yes, I did.

Q And did you start trying to do that?

A Yes, I did.

Q Were you ever able to raise the amount of money he said he wanted?

A No, no.

Q When was your first knowledge that -- strike that. During the month of March, did he see you periodically at the jail?

A I believe he came up twice.

Q Did you have any court appearances during March?

A I don't believe so, no.

Q Each time he came to the jail to see you, the two of you talked?

A Yes, uh-huh.

Q When did you become aware that he was not going to be your retained counsel?

A That would have been April 3.

Q Subsequently, did he become your court appointed counsel?

A Yes, he did.

[HCT 9]

Q Now, during the month of March of 1973, did you periodically have conversations with one or more law enforcement officers?

A Oh, yes, yes.

Q Would you name the officers that you talked to during that month?

A Oh, would have been Delbert Petersen, Al Freeseman --

THE COURT: Al, who?

MR. SATTER: Freesemann.

A Delbert Petersen.

[HCT 10]

THE COURT: You named him already.

MR. SATTER: I have, oh, excuse me.

A Delbert Koch, Floyd LeVake, Curtis Berg. Do you want just the local ones or all of them?

Q Well, no --

A That would be quite a list.

Q All of these were local ones?

A Yes, uh-huh.

Q Did you make each of these persons aware of your -- strike that. Did you make each of these persons aware either that Mr. Hackett was representing you or that you were seeking counsel?

A Oh, yes.

THE SATTER: That I was seeking. I was trying to get the money together to hire Mr. Hackett.

THE COURT: But not that you were presented?

MR. SATTER: No. Oh, no.

Q Do you know what I mean when I refer to the Miranda rights?

A Yes, yes.

Q At any time during the month of March, did any law enforcement officer give you your Miranda rights?

A Yes.

Q And do you remember who that was?

[HCT 11]

A Most of them.

Q Okay. Were you actually questioned by any law enforcement officers during that month concerning these two deaths?

A The month of March?

Q Yes.

A No. No, sir.

Q Were you at sometime during the month of April?

A Yes.

Q Do you recall which of these officers that you've named questioned you concerning those deaths?

A Be the sheriff at that time, Curtis Berg.

Q Anyone else?

A Jerry Lindbert, Delbert Petersen, Floyd LeVake.

Q Prior to questioning by any of those four persons, did that person give you your Miranda rights?

A Each and every one of them? That the question?

Q Yes, each and every one.

A No.

Q Which one or ones did?

A Delbert Petersen would be the only one that did.

Q All right. Do you recall when it was that you first talked to him concerning these deaths?

A That would have been April, April 5, April 6, somewhere in that neighborhood.

[HCT 12]

Q All right. Prior to that time, had you talked to Berg and Lindberg and LeVake concerning the two deaths?

A Yes, yes.

. . .

Q You signed it?

A Yes, sir.

Q There are a couple other signatures down there and those are, who?

A Al Freesemann and Delbert Petersen.

Q And did you see them sign?

A I wasn't expecting that question. Yeah, yeah, I imagine I did, yes. I'm sure they were signed at the same time.

Q Okay. This bears a date of April 12.

A That's correct.

Q 1973?

A Yes, sir.

Q At Watertown, South Dakota?

A Uh-huh (affirmative response).

Q Is this the only written statement you signed concerning those two deaths?

A No. It is not, no.

Q You signed how many others?

A One other.

Q When was the other signed?

A The day before, April 11.

Q Did it bear the date the 11th? Do you recall?

A I couldn't say. I couldn't say.

Q Was that also signed here in Watertown?

[HCT 14]

A Yes. Yes, it was.

Q Was that statement identical word for word with this one?

A I believe it is, yes.

Q Now, both of those were referred to at trial and were received in evidence, were they not?

A Yes, they were.

[HCT 15]

Q Okay. Now, how did the signed statement the 12th come about?

A Well, they called me in out of my cell right around -- right after dinner, and I believe it was Al Freesemann, but I'm not sure. Al Freesemann or Delbert

Petersen. They were both there. One of them told me there were some typographical errors in the first statement and they wanted me to look at the second statement here and see if it read identical to it and then sign this one.

Q And did you read it over?

A Yes, I did.

Q And it appeared to be identical?

[HCT 16]

A Yes.

Q And you signed it?

A Yes.

Q Prior to the session on the 11th here that resulted in a written statement being signed, had you previously talked to anyone about the two deaths and told them substantially the story that's in the statement?

A Prior to the 11th?

Q Prior to the meeting here in Watertown on the 11th.

A Oh, yes.

Q Okay. When and where was that?

A That would have been in Bud Brown's office in Sioux Falls, South Dakota.

Q And who was present?

A Well, Bud Brown, myself, Delbert Petersen, and, I believe, Al Freesemann.

Q Now, prior to -- strike that. Was that on the 11th?

A Yes.

Q But that was in Sioux Falls?

A Yes, uh-huh.

Q Prior to your -- strike that. Was that statement, the one in Sioux Falls, ever reduced to writing as far as you know?

A No, no.

Q At least you never signed any statement about it?

[HGT 17]

A Oh, no, no. Pete, I believe, took notes.

[HCT 18]

CROSS-EXAMINATION

Q (By MR. ELLYSON) When were you actually charged with the offenses? April 1, you believe?

A No, I was first questioned April 1.

Q Okay. Do you know when you were first served with a complaint or --

A No, I don't. I believe it was around -- 17th or 18th of April, does that sound right? I have no idea.

Q When was Mr. Hackett appointed by the Court to represent you?

A That same day.

Q April 17?

A Whenever. Don't hold me to that date. I'm not sure of that date.

THE COURT: I think previously indicated it was April 3.

MR. SATTER: No. No, April 3 was the arraignment on the burglary.

THE COURT: Oh, I thought your arraignment was on this. All right.

MR. SATTER: No.

THE COURT: All right. That was when Hackett was appointed, was it not?

MR. SATTER: No. No, that's when I found out for sure that Hackett wasn't.

THE COURT: You knew he wasn't going to be retained,

[HCT 24]

but I thought you indicated that on the same day he was appointed.

MR. SATTER: No, no, sir. If I said that, that's not correct.

Q (By MR. ELLYSON) Okay. So, on April 11th and 12th, you did not have counsel?

A No, I tried to get a lawyer April 11, but I was unsuccessful.

Q No attorney had been retained and no attorney had been appointed.

A No.

Q And apparently on April 11 you agreed to go to Sioux Falls to take a polygraph?

A That's correct.

Q You did take one; is that right?

A Yes.

Q And do you recall what the results were?

A I flunked it.

[HCT 25]

Q I believe you testified that you talked with five or six local law enforcement officers?

A That's correct.

Q Prior to April 11?

A Yes.

Q And, in fact, you talked to maybe 10 or 15 out-of-state authorities?

A Oh, at least, yes.

Q And what did that all involve?

[HCT 32]

A Burglaries, mostly.

Q Okay. And isn't it true you talked to some authorities from Minnesota that you had information about the Pieper kidnapping?

A Yes, yes.

Q And, of course, that didn't turn out to be true?

A No, no.

MR. BRAITHWAITE: I'll object to that line of questioning as immaterial.

THE COURT: Sustained.

Q Approximately before April 11, how many times since you were incarcerated on March 1 were you Mirandized by various officers?

A Oh, my, I couldn't give you an answer to that.

Q Would you say more than 20 times?

A I can't -- that's too far back to remember and I couldn't give you an answer.

Q More than five?

A Oh, I'm certain more than five, yes.

Q More than ten?

A Well, you're asking for a question I can't answer.

Q Okay. I'll show you a voluntary statement, I guess, that was Exhibit 21 at the time of the trial and ask you to look at that.

A (Witness complies.)

[HCT 33]

MR. BRAITHWAITE: Counsel, is this the exhibit itself or a copy of it?

MR. ELLYSON: It's the exhibit itself.

MR. BRAITHWAITE: Thank you.

Q Okay. Does that appear to be a statement that you testified initially was given on April 11?

A Yes.

Q That's the one prepared by Delbert Petersen?

A That's correct.

Q Does your signature appear on it?

A It does, yes.

Q Now, on page 1 of that exhibit is entitled a voluntary statement.

A Uh-huh (affirmative response).

Q Does your signature appear on that statement?

A It does, yes.

Q And have you ever had experience signing a statement like this?

A No, no, no, I haven't. Not that I recall. I believe that's the first one.

Q Was this -- did you read this statement? Do you recall?

A I don't know if I did or not. That's too far back to answer.

Q Did Mr. Petersen read it to you?

A I don't believe so. He may have, but I don't believe so.

[HCT 34]

Q Doesn't paragraph six on this statement say that no law enforcement officers can prompt me what to say in this statement or write it out for me unless I choose for him to do so?

A Oh, let's see. All right. I see that, yes.

Q Doesn't the statement also state that I certify that no attempt has been made by law enforcement officers to prompt me what to say, nor was I refused any request that the statement be stopped, nor at any time during this statement did I request for the presence or advice of a lawyer?

A If it says that, I'll take your word for it. I didn't --

[HCT 35]

Q And, basically, your testimony doesn't vary in any great degree to Exhibit No. 21 or, I believe, 49. Isn't that true?

A It shouldn't. I don't recall what -- I haven't had my transcript for several months. I really haven't refreshed my memory on it. It shouldn't have diverged too far from it.

Q Your whole line of defense was self-defense?

A That's correct, yes, sir.

Q At the trial you never denied killing the two individuals?

A No, sir.

[HCT 38]

THE COURT: So I understand this, apparently, you were maintaining that it was self-defense at the time you were talking to Mr. Petersen; is that correct?

MR. SATTER: That's correct. I knew --

THE COURT: At what point did he tell you that he didn't think that was a valid defense?

MR. SATTER: It wasn't Mr. Petersen, it was Mr. Freesemann, as I recall.

THE COURT: And where did that take place?

MR. SATTER: Here in Watertown.

THE COURT: And when did that take place?

MR. SATTER: Oh, the 10th, I believe.

THE COURT: This was the 10th?

MR. SATTER: 10th or the 11th.

THE COURT: So, it was before you took the polygraph exam.

MR. SATTER: That's right.

THE COURT: So you were aware that what you thought was a defense of self-defense may not be available to you?

MR. SATTER: Oh, I was told that, yes.

[HCT 44]

THE COURT: Well, you were aware of it, then?

MR. SATTER: Right, right.

THE COURT: So you were at least informed that you couldn't rely on that?

MR. SATTER: I was told I couldn't, yes.

THE COURT: All right. So, then, after you were told that, you still --

MR. SATTER: Insisted on the test, yes.

THE COURT: -- still took the polygraph. And it's your position that you failed the polygraph because of, what?

MR. SATTER: Just what I was told, I think, that upset me enough.

THE COURT: You were told that on the 10th?

MR. SATTER: Or just prior to it.

THE COURT: And just prior to it you took the polygraph on the 11th?

MR. SATTER: On the 11th, right. But, mean, prior to that, tho conversations, I believed it w self-defense.

THE COURT: All right. But then it w after that conversation you consented the polygraph?

MR. SATTER: Uh-huh (affirmati response).

THE COURT: Even though you were upset?

MR. SATTER: Right.

[HCT 45]

THE COURT: But you didn't feel you we upset at the time or else you didn recognize you were upset at the time?

MR. SATTER: Well, I was still -- still felt it was self-defense. I fe confident that anybody who heard th story, what happened, would agree tha it was self-defense.

THE COURT: Okay.

MR. BRAITHWAITE: Nothing further, your Honor.

RECROSS-EXAMINATION

Q (By MR. ELLYSON) I guess, just to make it clear: so, when you were taking the polygraph, you were telling the polygraph examiner, basically, what's in Exhibit 21, 49?

MR. BRAITHWAITE: Just a minute --

A Well, I don't remember the tests that well, Mr. Ellyson. I really don't.

MR. BRAITHWAITE: Oh, okay.

Q Okay. But you weren't in the polygraph examination maintaining that somebody else had killed him?

A Well, there was a polygraph test prior to this and I had maintained that, yes, and had flunked that one, and then we went back down.

Q But the one on April 11 you were maintaining, then, that you had shot in self-defense?

[HCT 46]

A Yes, yes.

MR. ELLYSON: I have no further questions.

THE COURT: It seems to discover new facts all the time. There was another polygraph exam; is that correct?

MR. SATTER: Yes, sir.

THE COURT: When was that?

MR. SATTER: I can't give you a date. It was prior to the 11th, considerably prior to the 11th.

THE COURT: Where was that?

MR. SATTER: In Sioux Falls.

THE COURT: And was that concerning the incident of the killings, or was that concerning the burglaries?

MR. SATTER: Both. I believe, everything. It was a little bit of everything involved in there.

THE COURT: Well, considerably before that your first contact was in March, as I understand it, concerning the possible, maybe the possible burglaries at that time. Apparently, it was on a firearms charge, and Mr. LeVake picked you up; is that correct?

MR. SATTER: Yes.

THE COURT: And then you were held until sometime on that apparently, and then you were talked to in April about burglaries and the killings?

MR. SATTER: Yes.

THE COURT: All right. So, now, considerably,

[HCT 47]

apparently, is sometime within ten days?

MR. SATTER: I'm sure of it, yes. I'm sure it would be.

THE COURT: Mr. Satter, you're a little vague in some details here.

MR. SATTER: Well, there were three or four tests. We went down to Sioux Falls three or four times, see, I'm having a little bit of --

THE COURT: I'm trying to catch up with you.

MR. SATTER: Okay.

THE COURT: We're playing catch up here.

MR. SATTER: All right.

THE COURT: All right. So, there were three or four tests. When were they? When was the first test?

MR. SATTER: First test would have been March 1.

THE COURT: And where was that?

MR. SATTER: Sioux Falls.

THE COURT: And what was that about?

MR. SATTER: The guns.

THE COURT: Okay. When was the next test? Wait a minute. Let's stay with that one. Who was present at that time?

MR. SATTER: Delbert Koch, Jerry Lindberg, and Bud Brown, and myself.

THE COURT: Okay. Next time?

[HCT 48]

MR. SATTER: I can't give you a date.

THE COURT: Well, let's come close.

MR. SATTER: I can't even come close. There were that many trips down there.

THE COURT: Well, was it the next week? Did you go back the next day? We're talking four or five trips to Sioux Falls within a 20-day period? 30-day period?

MR. SATTER: Well, yeah. Forty-day period, I suppose. I can't do it. I can't give you a --

THE COURT: Well, would Mr. Brown have a record of these?

MR. SATTER: I'm sure of it, yes.

THE COURT: And I would assume, also, that the questions Mr. Brown used had been reduced to writing, weren't they?

MR. SATTER: Yes, yes.

THE COURT: And, I think the usual procedure, maybe I'm wrong, is -- do they show you those questions prior to the test?

MR. SATTER: Oh, yes, yes.

THE COURT: So you were aware of the questions. So, between March 1 and April 11, if I understand your testimony, you took four or five polygraph exams?

MR. SATTER: Yes.

THE COURT: And were you advised of the results each time?

MR. SATTER: Yes.

THE COURT: And do you recall what the results were each time?

MR. SATTER: I think I failed them all.

THE COURT: The results were that you had failed all of them?

MR. SATTER: Yes.

THE COURT: So, at the time of the April 11 polygraph exam --

MR. SATTER: Uh-huh (affirmative response).

THE COURT: -- you could be considered a veteran of polygraph exams, couldn't you?

MR. SATTER: Oh, yes, yes, certainly.

THE COURT: But something on the 10th, then, upset you that you felt that caused you to be in an emotional state that caused you to fail the test on the 11th?

MR. SATTER: Yes.

THE COURT: Okay.

MR. SATTER: Could I add something here?

THE COURT: Might as well.

MR. SATTER: All right. There was additional tests after this.

THE COURT: Okay.

MR. SATTER: Concerning everything, which I thought would include the promised test, see, so we went down

[HCT 50]

there and this concerned a homicide in Custer.

THE COURT: When was this one?

MR. SATTER: Oh, about the 17th or 18th of April. Now, I took that test and I passed it, in Custer.

THE COURT: Did that involve this one or did it involve just --

MR. SATTER: Well, I'm getting there. It was the burglaries, the Custer homicide, and these homicides here.

THE COURT: Okay.

MR. SATTER: Okay. I took the one about the Custer homicide; I passed that. I took the ones about the burglaries; and I passed that. And then when it came time for this one, they refused to give it to me.

THE COURT: Okay. And then they wouldn't -- they didn't ask you any questions about the Codington County one?

MR. SATTER: They refused.

THE COURT: Okay.

MR. SATTER: That was on the 17th or 18th. Somewhere in that area.

THE COURT: Again, that was Bud Brown?

MR. SATTER: Yes.

THE COURT: Who else was present?

MR. SATTER: Al Freesemann, I know, and, I believe,

Delbert Petersen, but it may have been Delbert Koch. I'm not sure. That's a little bit too far back to remember.

THE COURT: So, Bud Brown, Al Freesemann. Who was Al Freesemann?

MR. SATTER: He was the Chief of Police at that time here in Watertown.

THE COURT: All right. And was Delbert Petersen or Delbert Koch?

MR. SATTER: One of the two, yes.

THE COURT: Who's Delbert Koch?

MR. SATTER: He was a police officer. I'm not sure what his rank was.

THE COURT: He was not the Sheriff's Department?

MR. SATTER: Oh, no.

THE COURT: He was a city police officer?

MR. SATTER: City PD, yes.

THE COURT: Okay. Anything else?

(NO VERBAL RESPONSE. WITNESS SHAKES HEAD FROM SIDE TO SIDE.)

THE COURT: I think I'm caught up now.

MR. SATTER: I think so. I think we're in chronological order now.

[HCT 52]

DELBERT PETERSEN,

called as a witness, being first duly sworn, was examined and testified as follows:

[HCT 67]

DIRECT EXAMINATION

Q (By MR. ELLYSON) Sir, would you please state your name for the record.

A Delbert Petersen.

Q And are you employed?

A I am a special agent for the State of South Dakota.

Q Are you familiar with the applicant, Steven Satter?

A I am.

Q And do you recall his trial in May of 1974?

A I do.

Q And did you assist in the investigation of that matter?

A I did.

Q Okay. Now, calling your attention to April 11, 1973, do you recall taking Mr. Satter down for a polygraph to Sioux Falls?

A I do.

MR. BRAITHWAITE: Pardon me. I didn't get the answer.

THE WITNESS: Yeah, I do.

MR. BRAITHWAITE: Thank you.

Q Did Mr. Satter submit to that polygraph examination?

A He did.

Q And prior to taking the examination, were any Miranda warnings provided him?

A There was.

Q Do you know who did that?

[HCT 68]

A I did.

Q Now, do you recall whether Mr. Satter gave you a statement before or after that polygraph on April 11?

A As I recall, it was afterwards.

Q And was that ever put in writing?

A Yes, it was.

Q And who put that into writing?

A I did.

Q How did you do that?

A On the statement form and typed it.

Q And did you then provide it to Mr. Satter -- is that right? -- for his review and signature?

A Pardon?

Q Did you provide the written statement then to Mr. Satter for his review and signature?

A I did.

Q Was another statement then prepared the following day eliminating some typographical errors?

A As I recall, there was.

Q Okay. Now, do you recall any discussion with Mr. Satter with regards to him taking another polygraph at a future date?

A I think that was discussed.

Q Okay. Do you know in what fashion it was discussed or what do you recall about that discussion? If you can remember.

[HCT 69]

A I don't recall the wording or anything like that.

MR. ELLYSON: Okay.

THE COURT: Well, do you know when it was or where it was or who was there?

Q Do you recall who was present on April 11?

A Yeah, the Chief of Police, Al Freesemann at that time.

Q And Mr. Satter?

A Mr. Satter and myself.

Q Anybody else?

A I just don't recall, unless it would be the guy that gave the polygraph examination, Bud Brown.

Q And you don't recall how the topic came up?

A I just don't.

Q Okay. Do you recall taking Mr. Satter for another polygraph approximately a week later to Sioux Falls?

A That I just don't recall.

Q Do you recall at any time denying Mr. Satter the opportunity to take a polygraph concerning the issues of the murder case in Codington County?

A No, I don't.

THE COURT: Wait a minute. You don't recall or you didn't deny him?

THE WITNESS: I never denied him.

[HCT 70]

CROSS-EXAMINATION

[HCT 71]

Q One of the paragraphs towards the bottom refers to polygraph exam, does it not?

A It does.

Q And, as I understand, you typed at least the original of that document, Exhibit 1; is that correct?

A That is correct.

Q And you put in that paragraph because Steve said it should go in, didn't you?

A That's right.

Q And that he wouldn't sign it without it in there?

A I don't know if he wouldn't sign it without it, but he wanted it in there.

[HCT 77]

Q You don't recall him saying he wouldn't sign it unless that was in there?

A That part I don't recall if he said he wouldn't sign it if it wasn't in there or not.

Q You just don't recall?

A No, I don't.

Q It's been 12, 13 years?

A That's correct.

Q Would you refer, again, to your notes on April 17 with respect to the polygraph examination in Sioux Falls, and do they show that he was examined on anything other than the Custer death?

A That he was examined on anything other than the Custer death?

Q Yes.

A No, he was not.

Q All right. You believe Exhibit 1 to be the truth, do you not?

A-319

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

STEVEN SATTER,
Petitioner and Appellant,

v.

HERMAN SOLEM,
Respondent and Appellee.

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
CODINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE IRVIN N. HOYT
Presiding Judge

APPELLEE'S BRIEF

ROGER A. TELLINGHUISEN
ATTORNEY GENERAL
Janine Kern
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501-5090
Telephone: (605) 773-2135
Attorneys for Respondent/
Appellee

Richard Braithwaite
Attorney at Law
Suite 222, Security Building
101 S. Main
Sioux Falls, South Dakota 57102
Attorney for Petitioner/Appellant

Notice of Appeal filed March 24, 1987

I

SATTER'S STATEMENTS TO SHERIFF BERG ON APRIL 1, 1973 WERE VOLUNTARY AND ADMISSIBLE.

As set forth in its Petition for Rehearing the State initially contends that Satter was not in custody for the murder of Kent Engle and Jerry Bowling at the time of the April 1, 1973, interview with Sheriff Berg. Satter therefore was not subjected to a "custodial interrogation" regarding his knowledge of the murders. Thus the State contends that Satter was not required to be Mirandized prior to questioning regarding the murders.

The recent Supreme Court opinion of Arizona v. Roberson, 56 U.S.L.W. 4590 decided June 15, 1988, does not refute this proposition. In Roberson, respondent was arrested at the scene of a burglary. He was advised of his rights and informed the police that he "wanted a lawyer before answering any

questions." 56 U.S.L.W. at 4591. Three days later a different law enforcement officer, unaware of Robertson's previous request for counsel, interviewed him regarding a separate offense after having read him his Miranda warnings. Roberson waived his rights and made incriminating statements.

The United States Supreme Court affirmed the trial court's decision suppressing these incriminating Statements finding that the prophylactic rule announced in Edwards v. Arizona, 451 U.S. 477, 484-485 (1981) prohibits police-initiated interrogation following the subject's request for counsel in a separate investigation. The court focused specifically on the fact that a suspect who has displayed his inability to cope with custodial interrogation by requesting counsel would be further compelled by additional interrogation on the separate offense without the aid of counsel.

This decision is inapplicable to the case at hand for several reasons. First this court did not address the Edwards v. Arizona, question in its opinion decided April 20, 1988. Second, although Satter was interviewed regarding a separate offense the facts do not support his claim that he was denied counsel in any way. Satter never invoked his right to counsel before, during or after his many interviews with law enforcement officials. Finally, even if Roberson were applicable to the case at bar, Patterson v. Illinois, 56 U.S.L.W. 4733 (June 24, 1988), holds that where the defendant has not requested counsel, Edwards is not applicable to require suppression of otherwise valid admissions. Miranda warnings given under the Fifth Amendment are not a constitutional right per se whereas the right to counsel is directly protected by the Sixth Amendment of the United States Constitution.

Assuming arguendo that Satter was subjected to custodial interrogation and should have been Mirandized, this Court must then determine whether his statements were nonetheless voluntary. It is well established law that an appellate court must make an independent determination of the voluntariness of a confession or admission. See e.g. Beckwith v. United States, 425 U.S. 341, 348, 96 S.Ct. 1612, 1617, 48 L.Ed.2d 1 (1976). The findings of the lower court regarding the circumstances surrounding a confession are to be adopted unless found to be clearly erroneous. See, Miller v. Fenton, 474 U.S. 104, 106 S.Ct. 445, 450, 88 L.Ed.2d 405 (1985).

In determining whether a confession is voluntary the court must assess the characteristics of an accused and the details surrounding the interrogation. Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct.

2041, 2047, 36 L.Ed.2d 854, 862 (1973). The absence of Miranda warnings is one factor to be considered in assessing the voluntariness of a confession or admission. See U.S. v. Pelton, 835 F.2d 1067, 1072 (4th Cir. 1987) quoting Davis v. North Carolina, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966); People v. Hadnot, 516 N.E.2d 582 (Ill.App. 1987).

In Connecticut v. Barrett, ____ U.S. ____, 107 S.Ct. 828, 821, 93 L.Ed.2d 920 (1987) the Court recently stated that "the fundamental purpose of Miranda was 'to assure that the individual's right to choose between speech and silence remains unfettered throughout the interrogation process.'" Quoting Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

In the case sub judice Sheriff Berg questioned Satter at the jail on April 1, 1973, regarding some burglaries in the area.

Satter was not Mirandized immediately prior to the interview on April 1, 1973, although the record reveals that he met with Attorney Hackett on March 3, 1973, and periodically throughout the month of March. Satter was fully Mirandized and questioned by law enforcement officials on at least five separate occasions during March. On every occasion Satter spoke freely and voluntarily with law enforcement officers. He never invoked his right to counsel or requested that an interview cease.

At the April 1, 1973 interview Sheriff Berg asked Satter if he knew anything about "two bodies that were supposed to be buried somewhere around the Watertown area." TT 72. Satter then asked Berg what criminal offense he could be charged with if in a hypothetical case he had been paid to destroy the bodies that had been buried. Burg replied that he could possibly be charged as

an accessory. TT 76. Nothing further was discussed about the bodies. Satter did not request an attorney or that the interview cease. Rather, Satter returned voluntarily to the subject of the bodies and told Sheriff Berg a fabricated story about a man named Amilio Deluci. Prior to these statements, however, Sheriff Berg in effect warned Satter that if he spoke about his involvement with the bodies he could be subjected to criminal charges. Satter therefore had a choice between speech and silence which he chose to waive. There is absolutely no support in the record for the contention that if Satter had been Mirandized prior to the April 1 interview he would have reacted differently.

The evidence suggests that Satter made a calculated plan to lead law enforcement officials away from him as a possible suspect. At the April 1, 1973, interview he invented a story about a man

named Amilio Deluci who had offered him a thousand dollars to cut up the bodies. TT 78. On April 4, 1973, in an interview with Delbert Peterson after being fully advised of his constitutional rights, Satter waived them and fabricated a second story about a man named Pinto who had supposedly killed the victims. HCT 12, TT 101, 102, 104, 105.

When evaluating the totality of the circumstances surrounding the April 1, 1973 interview and the characteristics of the accused, the State contends that Satter's statements were voluntary and thus admissible. Satter had four prior felony convictions at the time of the April 1, 1973, interview and was therefore familiar with all stages of the criminal justice system. The record is absolutely devoid of any police misconduct or coercive tactics during the April 1, 1973, interview. See Colorado v.

Connelly, 107 S.Ct. 515, 523 (1986). Finding these statements to be voluntary will not violate the spirit of the prophylactic Miranda rule because Satter's will was not in any manner overborne, and because Satter was not in custody with regard to the murders. Satter was well aware of his rights and chose to waive them and speak freely and voluntarily with Berg with the hope of leading law enforcement officials away from him as a possible suspect.

II

SATTER'S ADMISSIONS AND CONFESSIONS MADE AFTER APRIL 1, 1973, WERE PROPERLY ADMISSIBLE UNDER Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985).

Even assuming arguendo that Satter should have been Mirandized and the April 1, statements should have been excluded, the error was rendered harmless by the admission of the subsequent, voluntary statements and confessions. In Oregon v. Elstad, supra,

police officers picked up Elstad on a burglary charge and asked him a series of questions without giving him the Miranda warning. After he was taken to the station house and advised of his Miranda rights he executed a written confession. The court held that it was an unwarranted extension of Miranda to hold that simple failure to administer Miranda warning, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period of time.

The State contends that the written statements of April 11 and 12 were free from any arguable "taint" because Satter was fully Mirandized prior to speaking with law enforcement agents, voluntarily waived his rights, and was not subjected to coercion or

improper police tactics. A number of federal and state courts have applied the doctrine of Oregon v. Elstad. In Petite v. State, 520 So.2d 207, 210 (Ala.Cr.App. 1987), the Court held that a defendant's confession made after proper Miranda warnings need not be suppressed solely because the police had obtained a previously unwarned admission from the defendant.

In State v. Klimpt, 744 S.W.2d 499, 502 (Mo.App. 1988) defendant argued that his extrajudicial statements to a police officer were inadmissible because he had been interrogated without benefit of a Miranda warning. The court found, however, that as the officer had not engaged in coercive tactics towards the defendant which would have undermined his will, all subsequent statements which were voluntarily, knowingly, and intelligently made were admissible.

In State v. Micheliche, 533 A.2d 41 (N.J. Super.A.D. 1987) the court held that a defendant's post-Miranda written statement was not "tainted" by his pre-Miranda oral admission that he "did it" and was thus admissible. In Micheliche the defendant and his cohort Correa voluntarily went to the police station for questioning regarding the murder. The two individuals were separated for questioning. Micheliche had not been Mirandized and when informed that his co-defendant was being questioned in the neighboring room he blurted out "I did it." 532 A.2d at 42.

The interview was then terminated, Micheliche was placed under arrest and advised of his Miranda rights which he waived in writing. Micheliche made a full written statement confessing his involvement in the murder. The New Jersey Superior Court held that the doctrine of Oregon v. Elstad

provides that the post-Miranda confession was not tainted by the prior unwarned admission either under the "fruit of the poisonous tree" doctrine or under the theory that a confession cannot be considered voluntary once the "cat is out of the bag." Also see, Miller v. Dugger, 838 F.2d 1530 (11th Cir. 1988); United States v. Lewis, 833 F.2d 1380 (9th Cir. 1987); Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987); Bell v. Lynbaugh, 663 F.Supp. 405 (E.D.Tex. 1987); People v. Freeman, 739 P.2d 856 (Colo.App. 1987); and People v. Scott, 512 N.E.2d 836 (Ill.App.3 Dist 1987).

The State respectfully urges this Court to carefully examine the doctrine of Oregon v. Elstad, and its application to the statements made by Satter after he had received the benefit of Miranda warnings. In the instant case Sheriff Berg used neither physical violence nor any other deliberate

means to coerce Satter's statements on April 1, 1973. Rather, the State contends that as in Elstad, Satter's first admissions were voluntary, although arguably obtained through a technical violation of Miranda. Even if not voluntary, under Oregon v. Elstad, there is simply no constitutional justification for excluding his subsequent Mirandized statements and written confessions of April 11 and 12 under the fruit of the poisonous tree doctrine. The doctrine of Oregon v. Elstad, clearly authorizes introduction of voluntary Mirandized statements, which fall on the heels of unwarned admissions.

A-334

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

STEVEN SATTER,
Petitioner and Appellant,

v.

HERMAN SOLEM,
Respondent and Appellee.

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
CODINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE IRVIN N. HOYT
Presiding Judge

RESPONDENT AND APPELLEE'S PETITION FOR REHEARING

ROGER A. TELLINGHUISEN
ATTORNEY GENERAL
Janine Kern
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501-5090
Telephone: (605) 773-2135
Attorneys for Respondent/
Appellee

Richard Braithwaite
Attorney at Law
Suite 222, Security Building
101 S. Main
Sioux Falls, South Dakota 57102

Notice of Appeal filed March 24, 1987

Second, the State respectfully contends that the court has misconstrued Supreme Court precedent governing the Fifth Amendment privilege against self-incrimination.

An analysis of the constitutional precedent applicable to this case must begin with Miranda v. Arizona in which the United States Supreme Court held that the Fifth and Fourteenth Amendments prohibition against compelled self-incrimination required that custodial interrogation be preceded by advice to the defendant that he has the right to remain silent and to the presence of an attorney. 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) reh'g denied 452 U.S. 973, 101 S.Ct. 3128, 69 L.Ed.2d 984 (1981).

Satter was not required by law to be Mirandized at the April 1, 1973, interview

with Sheriff Berg because he had not been charged with the murders, was in custody on another charge, and was not the subject of a custodial "interrogation" regarding his involvement in the murders.

The Eighth Circuit recently had occasion to address this question in Leviston v. Black, No. 87-1303, slip op at 4 (8th Cir. April 4, 1988). Leviston, who was ultimately convicted of robbery, was in custody on an unrelated misdemeanor conviction for assault. He contacted police officers wishing to speak about the robbery. Leviston, in an unmirandized interview told an officer a fabricated story about how his girl friend had committed the robbery.

After checking out this story, the officer returned two weeks later to again interview Leviston. The officer implied that Leviston may have been involved in the robbery. Leviston replied and made

incriminating statements. Statements from both unmirandized interviews were introduced at Leviston's trial for robbery, over his objection. On appeal, the Eighth Circuit set forth the applicable law:

> Miranda warnings are required for official interrogations only where 'a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' United States v. Helmel, 769 F.2d 1306, 1320 (8th Cir. 1985) (quoting Miranda v. Arizona, 384 U.S, 436, 444 (1966)). While Miranda may apply to one who is in custody for an offense unrelated to the interrogation, see Mathis v. United States, 391 U.S. 1, 4-5 (1968), incarceration does not ipso facto render an interrogation custodial, Cervantes v. Walker, 589 F.2d 424, 427 (9th Cir. 1978), cited in Flittie v. Solem, 775 F.2d 933, 944 (8th Cir. 1985) (en banc). In all cases, we must consider the totality of the circumstances, including the individual's 'freedom to leave the scene and the purpose, place and length' of the questioning.
>
> Helmel, 769 F.2d at 1320. The relevant inquiry is whether a reasonable man in the suspect's position would have understood himself to be in custody. Berkemer

> v. McCarty, 468 U.S. 420, 442 & n. 35 (1984); United States v. Jones, 630 F.2d 613, 616 (8th Cir. 1980) (per curium); but see United States v. Rorex, 737 F.2d 753, 756 (8th Cir. 1984) (decided before Berkemer). . . .

Leviston, supra at 4. The Eighth Circuit affirmed the federal district court's findings that the statements were properly admissible based on the length of the interviews, the absence of police misconduct, and that Leviston initiated the police interviews. The Court found that Leviston could not reasonably have believed he was in custody with respect to the robbery during either interview. Slip op. at 5.

Likewise, the State submits that Satter could not reasonably have believed he

was in custody on April 1, 1973, for the murders of Bowling and Engle.[1]

Prior to the interview he was fully advised of his constitutional rights on at least five occasions during the month of March 1973. He had met with an attorney on

---

[1]The State challenges the lead opinion's contention in footnote 1 that the state's position in State v. Holland, 346 N.W.2d 302, 305 (S.D. 1984) serves as a carte blanche, blanket concession that all jail interviews are custodial interrogations. This implication contradicts well-established law in this area that it is not custody per se but the custodial nature of the interrogation which triggers the necessity for adherence to the specific requirements of the Miranda holding. Beckwith v. United States, 425 U.S. 341, 346 (1976); U.S. v. Jones, 818 F.2d 1119, 1123 (4th Cir. 1987). For example, compare Orozco v. Texas, 394 U.S. 324 (1969) (Miranda warnings apply to interrogation in defendant's bedroom), with California v. Beheler, 463 U.S. 1121, 1122-23 (1983) (defendant not "in custody" during questioning at police station). Jones, supra at 1123. The State contends that a determination of what constitutes "custodial interrogation" must be made strictly on a case by case basis.

at least three occasions and, additionally, was Mirandized at least twice prior to receiving polygraph exams during March. Further, Satter had four prior felony convictions, one during the year 1973. These four convictions undoubtedly resulted in frequent contacts with the criminal justice system in the past, ranging from initial interrogation through the trial and sentencing stages.

There was absolutely no evidence of police misconduct or coercive tactics at the April 1, 1973, interview. Colorado v. Connelly, 107 S.Ct. 515, 523 (1986),

Satter knew his rights, was not in custody on the murder charges and was not subjected to a "custodial interrogation" about his involvement in the murders. Even assuming arguendo that Satter should have been Mirandized and the April 1 statements should have been excluded, the error was

rendered harmless by the admission of the subsequent, voluntary statements and confessions.

II

SATTER'S ADMISSIONS AND CONFESSIONS MADE AFTER APRIL 1, 1973, WERE PROPERLY ADMISSIBLE UNDER OREGON V. ELSTAD, 470 U.S. 298, 105 S.CT. 1285, 84 L.ED.2D 222 (1985).

The State respectfully urges this Court to address the unresolved legal question regarding the admissibility of Satter's post April 1, 1973, statements. Slip opinion No. 15731 in its present form does not address these questions or provide adequate guidance for the lower courts on retrial. The lead opinion states that the April 1, 1973, statements were involuntary and that any evidence resulting therefrom could be subject to the "Fruit of the Poisonous Tree Doctrine." Justice Sabers concurring in result only states that the Issue I statements (presumably the April 1,

1973, statements) should be excluded unless found to be voluntary.[2] As this question will undoubtedly be raised if retrial is necessary, the State urges this Court in the interest of judicial economy to take the next step in the analysis and apply the doctrine of Oregon v. Elstad, supra. Such further analysis is appropriate because the State contended in its brief and at oral argument that admission of the April 1, 1973, statements if error, were harmless in light of the admission of Satter's subsequent Mirandized statements.

In Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), police officers picked up Elstad on a burglary charge and asked him a series of questions

---

[2]Again, it is important to note that the habeas corpus court already found these statements to be voluntary.

without giving him the requisite Miranda warning. After he was taken to the station house and after he was advised of and issued his Miranda rights, he executed a written confession.

The United States Supreme Court began its analysis by considering whether and under what circumstances the failure to administer Miranda warnings prior to a confession "taints" under the "Fruit of the Poisonous Tree Doctrine," a subsequent confession. The court first pointed out that the "Fruit of the Poisonous Tree Doctrine" applies only to constitutional violations. Id. 105 S.Ct. at 1291. It is important to note, however, that the Miranda exclusionary rule "sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation. The Fifth Amendment prohibits use by the prosecution in its case in chief only

of compelled testimony." Id. 105 S.Ct. at 1292. (Footnote omitted, emphasis in original.)[3] The court stated that although Miranda creates a "presumption of compulsion" which, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted." Id. The Court in conclusion held that:

> It is an unwarranted extension of Miranda to hold that simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though Miranda requires that the unwarned admission must be suppressed, the admissibility of any subsequent

---

[3]As quoted in Martin v. Wainwright, 770 F.2d 918, 928-929 (Cir. 1985), see also Elledge v. Dugger, 823 F.2d 1439, 1443 (11th Cir. 1987).

> statement should turn in these circumstances solely on whether it is knowingly and voluntarily made. Id. 105 S.Ct. at 1293-94.

There was absolutely no evidence of police misconduct or coercive tactics at the April 1, 1973, interview. The record is devoid of any suggestion that Sheriff Berg resorted to physical or psychological pressure to elicit statements from Satter or that Satter was worn down by improper interrogation tactics, lengthy questioning, trickery or deceit.

Thus the State contends that the written statements of April 11 and 12 were free from any arguable "taint" because Satter was fully Mirandized prior to speaking with law enforcement agents, voluntarily waived his rights, and was not subjected to coercion or improper police tactics.

The remainder of the Elstad opinion analyzes the so-called "cat out of the bag

rule." The United States Supreme Court had agreed with Elstad that his first statement was properly suppressed. The court reversed the Oregon Supreme Court, however, which had determined that the written confession which followed should also be suppressed because the first oral statement let the cat "sufficiently out of the bag to assert a coercive impact on the second interrogation." State v. Elstad, 658 P.2d 552, 555 (1983). The cat out of the bag rule was originally derived from the Supreme Court case of United States v. Bayer, 331 U.S. 532, 667 S.Ct. 1394, 91 L.Ed.2d 1654 (1947), and is based on the notion that a defendant who has once let the "cat out of the bag" by confessing to a crime is "never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag." Id. at 540, 67 S.Ct. at 1398. In Elstad, the Supreme Court flatly

rejected such a broad interpretation of the "cat out of the bag rule" stating:

> This court has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver. . . . when neither the initial or subsequent admission is coerced, little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the fact finder . . . .
>
> There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a 'guilty secret' freely given in response to an unwarned but noncoercive question. . . .
>
> [T]here is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of Miranda, was voluntary. The relevant inquiry is whether, in fact, the second statement was also voluntarily made. . . .
>
> The fact that a suspect chooses to speak after being informed of his

> rights is, of course, highly probative. . . . No further purpose is served by imputing 'taint' to subsequent statements obtained pursuant to a voluntary and knowing waiver. We hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings.

Elstad, 105 S.Ct. at 1295, 1298. (Emphasis added.)

In the instant case, the police used neither physical violence nor other deliberate means to coerce Satter's first admission. Rather, the State contends that, as in Elstad, Satter's first admissions were voluntary although obtained through a technical violation of Miranda. Even if not voluntary under Oregon v. Elstad, there is simply no constitutional justification for excluding his subsequent Mirandized statements and written confessions of April 11 and 12 under either the "fruit of the

poisonous tree doctrine" or the "cat out of the bag rule." Thus, admission of the April 1, 1973, fabricated statement was rendered harmless by Satter's subsequent Mirandized confessions given ten days later. The doctrine of Oregon v. Elstad clearly authorizes introduction of voluntary Mirandized statements, which fall on the heels of unwarned admissions.

A-350

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

STEVEN SATTER,
Petitioner and Appellant,

v.

HERMAN SOLEM,
Respondent and Appellee.

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
CODINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE IRVIN N. HOYT
Presiding Judge

APPELLEE'S BRIEF

ROGER A. TELLINGHUISEN
ATTORNEY GENERAL
Janine Kern
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501-5090
Telephone: (605) 773-2135
Attorneys for Respondent/
Appellee

Richard Braithwaite
Attorney at Law
Suite 222, Security Building
101 S. Main
Sioux Falls, South Dakota 57102
Attorney for Petitioner/Appellant

Notice of Appeal filed March 24, 1987

ARGUMENTS

I

THE HABEAS CORPUS COURT CORRECTLY FOUND THAT APPELLANT'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE ADMISSION OF STATEMENTS HE MADE TO SHERIFF BERG ON APRIL 1, 1973.

Satter alleges that the habeas corpus court erred by finding his April 1, 1973, statements to Sheriff Curtis Berg admissible at his May 7, 1974, jury trial. He attacks the admission of these statements on three grounds. First, he contends that as he was not Mirandized immediately prior to his interview he was deprived of his privilege against self-incrimination. Second, he contends that he was deprived of the assistance of counsel at the April 1, 1973, interview. Lastly, he alleges that the sheriff breached a promise to him to keep confidential any information revealed as a part of the interview and that this somehow rises to the level of a constitutional violation.

A. Satter's Statements of April 1, 1973, Were Freely and Voluntarily Given.

Satter contends that his April 1, 1973, statements were involuntary because he was not immediately Mirandized prior to the interview with Sheriff Berg. In his appellate brief at pages 5 and 6, Satter states that:

> The statements in question were made as a result of questioning by the Sheriff on April 1st (TT 70-72) while Satter was in jail (TT 72); prior to the questioning he was not advised of his Miranda Rights (TT 73); in fact, the first time Satter was given his Miranda Rights by any law enforcement officer was April 5th or 6th. (Emphasis added.)

This is a clearly misleading or false representation of the record. Satter was taken into custody on March 1, 1973, by his probation officer for a possible probation violation. HCT 6. On March 3, 1973, Satter met with Attorney William Hackett at the Codington County Jail where he

was detained. HCT 8. Satter received counseling from Hackett periodically during the month of March. Satter made no court appearances during March.

Pursuant to Satter's own admissions at his habeas corpus hearing, he met with law enforcement officers at least five times during the month of March about his involvement in a number of burglaries. HCT 11. On each occasion he was informed of his Miranda rights before the interviews began. HCT 11, 12, 33. Satter was also given a polygraph exam on March 1 and another a few days later. HCT 50. Satter was fully Mirandized at each of these examinations. Satter never requested the assistance of an attorney during any of these interviews. He did let the law enforcement officers know that he was trying to hire Hackett but was not represented by him at the time of the interviews. HCT 11.

Furthermore, Satter was no stranger to the legal system on April 1, 1973. He had been convicted of four prior felonies. TT 187. He was convicted twice of burglary or grand larceny in 1967. TT 187. He was also convicted of felonies in New Ulm, Minnesota, in 1971 and of another felony in 1973. TT 187.

On April 1, 1973, Sheriff Berg received an anonymous phone call from an individual who gave him directions to the graves of two bodies buried south of Kranzburg. TT 72. The caller suggested that if Berg was unable to locate the bodies, he should go to the jail and question Satter. TT 71.

After an unsuccessful search for the graves, Berg went to the jail and questioned Satter about some burglaries in the area. TT 72. Berg then asked Satter if he knew anything about "two bodies that were

supposed to be buried somewhere around the Watertown area." Id. Satter did not answer yes or no but replied with a hypothetical question. Satter asked Berg what criminal offense he would be charged with if he had been paid $1,000 to destroy two bodies that had been buried. TT 76. Berg replied that he could possibly be charged as an accessory.

Berg then changed the subject and the two discussed other matters. TT 76. Satter then returned to the subject of the bodies and told Berg where they were located. TT 77. Satter told Berg a fabricated story about a man named Amilio Deluci from Minneapolis, who came to Watertown to collect his share of some burglary proceeds from a man named Jerry Bowling and a second individual. TT 77. When Deluci found that the two had spent his money, he killed them and offered Satter $1,000 to burn their bodies with a torch. TT 78. Satter told

Berg he couldn't do it because of the smell. Satter never admitted killing anyone at this point in time or confessed to the crime. TT 78. Satter never requested the presence of an attorney or that the interviews stop.

Berg followed Satter's directions and found the bodies. TT 80. Berg also testified that law enforcement officers checked the Minneapolis area for a man named Amilio Deluci but were unable to locate anyone by that name. TT 93.

Satter was not interviewed again about the bodies until April 5, 1973. Delbert Petersen interviewed Satter twice on April 5 after fully advising him of his constitutional rights. TT 101, 102, 104, 105; HCT 12. Satter never requested the assistance of an attorney or that the interviews cease. Satter at this time fabricated another story about a man named Pianto who had supposedly killed the victims.

On April 11 Satter was transported to Sioux Falls for a polygraph examination. HCT 68. Prior to taking the examination, he was Mirandized. Id. After Satter failed the examination, he decided to tell law enforcement officers the truth about the killings and admit to being the murderer. He was then transported to Watertown where he was again Mirandized prior to signing a typed statement describing the murder. TT 107.

Prior to signing this statement, Satter had been Mirandized at least twenty times since his incarceration. He never requested the presence of an attorney during an interview or that the questions cease.

Prior to the Supreme Court's decision in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the admissibility of statements made by an accused in custody were judged solely by examining whether or not they were

"voluntary" within the meaning of the due process clause. See Haynes v. Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963). Statements obtained by methods or techniques violative of due process, however, were deemed inadmissible. Id.

The Supreme Court in Miranda, however, required suppression of many statements that would have been admissible under the due process test by presuming that in-custody statements made without adequate warnings were protected by the Fifth Amendment. As the Court pointed out in Michigan v. Tucker, 417 U.S. 433, 444, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), the Miranda Court

> [P]resumed that interrogation in certain custodial circumstances is inherently coercive and . . . that statements made under those circumstances are inadmissible unless the suspect is specifically informed of his Miranda rights and freely decides to forego those rights. The prophylactic Miranda

> warnings therefore are not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.

It is uncontested that in the instant case Satter was not given Miranda warnings on the morning of April 1, 1973, prior to questioning by Sheriff Berg. It is also uncontested that Satter did not confess to murdering Bowling and Engle at this time but did make statements which were incriminating. The State, however, contends that these statements were voluntarily given and admissible despite the fact that Satter was not Mirandized on April 1, 1973.

The failure to Mirandize on April 1, 1973, creates a rebuttable presumption that the statements were inadmissible because of the coercive nature

of an in-custody interrogation.[1] See United States v. Short, 790 F.2d 464 (6th Cir. 1986); Stumes v. Solem, 752 F.2d 317 (8th Cir. 1985). The ultimate question, however, centers on whether or not an accused knew his constitutional rights and knowingly and voluntarily waived them. This determination depends on the facts and the totality of the circumstances of each particular case, including the background, experience, and conduct of the accused. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed.2d 1461 (1938); Stumes v. Solem, supra; Fare v. Michael C., 442 U.S. 707, 724-725, 99 S.Ct. 2560, 2571-2572, 61 L.Ed.2d 197 (1979).

---

[1]See Oregon v. Elstad, 470 U.S. 298, 105 S.Ct 1285, 84 L.Ed.2d 222 (1985) wherein the Court states that there is no requirement for presuming a coercive effect where the suspect's initial inculpatory statement, though technically in violation of Miranda was voluntary.

Satter had been fully advised of his constitutional rights on at least five occasions during the month of March 1973. He had met with an attorney on at least three occasions and, additionally, was Mirandized at least twice prior to receiving polygraph exams during March. Further, Satter had four prior felony convictions, one during the year 1973. These four convictions undoubtedly resulted in frequent contacts with the criminal justice system in the past, ranging from initial interrogation through the trial and sentencing stages.

There was absolutely no evidence of police misconduct or coercive tactics at the April 1, 1973, interview. The record is devoid of any suggestion that Sheriff Berg resorted to physical or psychological pressure to elicit statements from Satter or that Satter was worn down by improper interrogation tactics, lengthy questioning,

trickery, or deceit. As the Supreme Court recently pointed out in Colorado v. Connelly, 107 S.Ct. 515, 523 (1986), "[T]he sole concern of the Fifth Amendment, on which Miranda is based, is governmental coercion." Citing United States v. Washington, 431 U.S. 181, 187, 97 S.Ct. 1814, 1818, 52 L.Ed.2d 238 (1977). The voluntariness of a waiver of the privilege against self-incrimination has always depended on the absence of police overreaching. Colorado v. Connelly, supra.

In Stumes v. Solem, 752 F.2d 317 (8th Cir. 1985), on remand from the Supreme Court, the Eighth Circuit held that admissions made during a non-Mirandized interrogation were admissible. On October 1, 1973, at 10 a.m. Stumes was questioned at the Green Bay Police Department about the murder of Joyce Hoff. He was read his Miranda rights prior to the interview. After a one and one-half hour interview, he invoked his

right to counsel, and the interview ceased. At 4:30 p.m. Stumes was again questioned without being given new Miranda warnings. As in the instant case, he made incriminating statements but did not confess.

After an examination of the totality of the circumstances surrounding Stumes' statements, the court found them to be admissible. Despite the lack of Miranda warning, Stumes was found to have knowingly waived his fifth amendment rights to remain silent and to have a lawyer present.

In light of the totality of the circumstances in the present case, the State contends that Satter's statements were likewise properly admissible as he freely and voluntarily chose to speak with Sheriff Berg and waive his fifth amendment rights. He was Mirandized regularly throughout the month of March 1973. The record is devoid of police coercion or impermissible interrogation

tactics. Satter was convicted of four prior felonies and was very familiar with the court system. He visited with an attorney on several occasions in March. As his testimony at his criminal trial indicates, Satter is an articulate and intelligent adult. Additionally, after Satter presented Berg with a hypothetical question about the two dead bodies and was informed that if he had knowledge of their location he could be charged with a criminal offense, he voluntarily returned to the subject of their location after his discussion with Berg had turned to other topics.

The habeas corpus court, after hearing all of the evidence before it, examined these factors and found Satter's statements to be voluntary and properly admissible and not made in violation of his privilege against self-incrimination. HCT 30. As this Court stated in State v.

Williamson, 349 N.W.2d 645 (S.D. 1984), a trial court's finding on whether or not a particular statement was voluntarily given is binding on this Court unless clearly erroneous. The State contends that Satter has failed to show that the court's decision was clearly erroneous.

B. Even if Satter's April 1, 1973, Statements Were Inadmissible, Any Error is Rendered Harmless by His Signed Statements Executed on April 11 and 12, 1973.

As stated repeatedly within, Satter was interviewed and Mirandized twice on April 5, 1973, by Delbert Petersen. On April 11, 1973, he was transported to Sioux Falls, Mirandized and given a polygraph test which he failed. Satter then admitted that he committed the murders. He was transported back to Watertown, again Mirandized, and presented with a voluntary statement setting forth the details of the admissions he made earlier that day.

APP 1-2. On the following day, April 12, 1973, he was presented with another signed statement which corrected several typographical errors found in the April 11 statement. He was again Mirandized and signed this statement. APP 3-4. Even if Satter's April 1, 1973, statements should have been excluded, any error is rendered harmless by the validity of his signed statements of April 11 and 12, 1973, in which he admits killing Engle and Bowling.

In Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), police officers picked up Elstad on a burglary charge and asked him a series of questions without giving him the requisite Miranda warnings. After he was taken to the station house and after he was advised of and waived his Miranda rights, he executed a written confession.

The United States Supreme Court agreed with Elstad that his first statement was properly suppressed. The Court reversed the Oregon Supreme Court, however, which had determined that the written confession should also be suppressed because the first oral statement let the cat "sufficiently out of the bag to assert a coercive impact" on the second interrogation.[2]

The Court rejected the notion that the second confession was coerced by Elstad's first statements. The Court held that, "The self-incrimination clause. of the Fifth Amendment does not require the suppression of a confession, made after proper Miranda warnings and a valid waiver of rights, solely because the police had obtained an earlier

---

[2] State v. Elstad, 658 P.2d 552, 555 (1983) as discussed in United States v. Short, 790 F.2d 464 (6th Cir. 1986).

voluntary but unwarned admission from the suspect. Oregon v. Elstad, 84 L.Ed.2d 225. The Court stressed that "the admissibility of any subsequent statement should 'turn solely on whether it is knowingly and voluntarily made.'" 105 S.Ct. 1293-1294.

In the present case, Satter was Mirandized on the morning of April 11, 1973, in Sioux Falls before he confessed. No one has ever contended that his waiver of Miranda rights was invalid or that the April 11 and 12 statements were obtained in violation of his fifth amendment rights. The Court in Elstad instructs us to "examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements." Elstad, supra, 105 S.Ct. 1298.

In light of the circumstances surrounding Satter's written statements of

April 11 and 12, 1973, discussed previously, the State contends that these statements were properly admissible. Assuming arguendo, that Satter's statements of April 1 should not have been admitted at trial, any error is rendered harmless in light of Elstad and the admission of Satter's written statements. The State would further contend that Satter has long since waived the right to contest the admissibility of the April 11 or 12, 1973, statements as it was not brought before the trial court or the habeas corpus court below.

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF CODINGTON) THIRD JUDICIAL CIRCUIT

STEVEN SATTER,
Petitioner and Appellant,

v.

HERMAN SOLEM, Warden of the South Dakota State Penitentiary,
Respondent and Appellee.

AFFIDAVIT OF DELBERT PETERSEN

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF CODINGTON)

I, Delbert Petersen, being first duly sworn, state under oath as follows:

That your Affiant has been employed as an agent for the South Dakota Division of Criminal Investigation for the past 35 years. That your Affiant assisted in the investigation of the 1972 slaying of Jerry Bowling and Kent Engle. That your Affiant participated in interviews with Steve Satter, during such investigation. That your Affiant is familiar with Steven Satter and the testimony that he presented in the murder

trial in the case in Codington County, State of South Dakota, Plaintiff vs. Steven Allen Satter, Defendant, wherein Steven Satter admitted that he had been convicted prior to the 1974 murder trial of four (4) prior felonies, and further admitted that he participated in the forty (40) burglaries during the summer of 1972. That your Affiant is further familiar with Steven Satter's testimony at said murder trial, wherein he admitted to being involved in two (2) prior gun fights, one in the State of Indiana and the other with a Sheriff in the State of Nebraska.

That your Affiant assisted in the investigation of Steven Satter's 1977, escape from the South Dakota State Penitenitary. That it was determined from such an investigation and interviews of Steven Satter, that following his escape, he was attempting to return to Watertown, South

Dakota, to seek revenge from one of the investigators of the original 1972 murder case. That based upon your Affiant's experience, investigations, and personal contacts with the Defendant, Steven Satter, your Affiant believes that if Steven Satter is released from custody, he will pose a serious and imminent danger to the community and general public.

/s/ Delbert Petersen, Affiant

Subscribed and sworn to before me this 14th day of February, 1989.

(SEAL)

/s/ Notary Public

My commission expires: 6/6/94

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF CODINGTON) THIRD JUDICIAL CIRCUIT

STEVEN SATTER,
Petitioner and Appellant,

v.

HERMAN SOLEM, Warden of the South Dakota State Penitentiary,
Respondent and Appellee.

AFFIDAVIT OF DENNIS KOCH

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF CODINGTON)

I, Dennis Koch, being first duly sworn, state under oath that I am a Detective for the Watertown Police Department.

That your Affiant has been employed by the Watertown Police Department for the past 23 years. That your Affiant assisted in the investigation of the 1972 slaying of Kent Engles (sic) and Jerry Bowling. That your Affiant is familiar with Steven Satter. That your Affiant is familiar with the fact that prior to his murder trial, Steven Satter had been convicted of four (4) prior felonies.

Supreme Court, U.S.
FILED
MAY 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1661

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RICHARD RIST, ACTING WARDEN
SOUTH DAKOTA STATE PENITENTIARY,

Petitioner,

V.

STEVEN SATTER,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF SOUTH DAKOTA

BRIEF FOR RESPONDENT

BRAITHWAITE LAW OFFICES
Suite 222 Security Bldg.
101 South Main
Sioux Falls, SD 57102
Telephone: (605) 331-2071)
Counsel for Respondent

TABLE OF CONTENTS

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING WRIT 4

I. PETITIONER HAS NOT PROPERLY INVOKED JURISDICTION. 4

II. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN OREGON VS. ELSTAD, 470 U.S. 298 (1985) 6

CONCLUSION 8

TABLE OF AUTHORITIES

CASES:

Miranda vs. Arizona,
384 U.S. 436 (1966) 6, 7

Oregon vs. Elstad,
470 U.S. 298 (1985) passim

STATUTES:

28 U.S.C. §1254(1) passim

28 U.S.C. §2101(c) 1, 4

OTHER:

Rules of the Court 20.2 and 20.4 1, 4

South Dakota Constitution Article VI, §9 1

NO. 88-1661

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RICHARD RIST, ACTING WARDEN
SOUTH DAKOTA STATE PENITENTIARY,

Petitioner,

STEVEN SATTER,

V.

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1); 28 U.S.C. § 2101(c); and Rule 20.2 and 20.4 of the Rules of this Court. None of those give this court authority to grant certiorari with respect to a State Court decision.

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the Federal Constitutional provisions set forth in the Petition, Article VI, §9 of the South Dakota Constitution is involved:

> No person shall be compelled in a criminal case to give evidence against himself or be twice put in jeopardy for the same offense.

STATEMENT OF THE CASE

References to the trial transcript will be made by the letters TT followed by the applicable page number; to the habeas corpus transcript by HCT followed by the appropriate page number: to the appendix by A followed by the applicable page number; to the petition for certiorari by PC followed by the appropriate page number.

The bulk of petitioner's statement of the case is accurate. The following are

necessary to correct inaccuracies of omissions in it.

Sheriff Berg did go to the County Jail and question respondent about some burglaries (PC 8). However, his purpose in going to the jail was not to question respondent about burglaries - but about the bodies (TT 73; A 143).

When Berg asked about the bodies, respondent initially posed a hypothetical question. Petitioner states the conversation then went to other subjects and respondent later returned to the matter of the bodies (PC 9). The subject of their conversation did switch from burglaries to bodies (TT 72; A 141). However, once the topic switched from burglaries to bodies, it remained there (TT 75-77; A 148-152).

Petitioner asserts respondent was given at least six polygraph examinations relative to this crime (PC 11). The record reveals

the April 11, 1973 polygraph examination was with reference to this crime (HCT 69; A 314; A 126). There is no evidence that any other polygraph examination dealt with this crime. In fact, it affirmatively shows other polygraph examinations dealt with guns and another unrelated death (HCT 47, 77; A 306, 318).

Petitioner's reference to affidavits filed with a Stay Motion are improper (PC 14). They were submitted over one month after the Supreme Court Decision this court is being asked to review and are immaterial (A 370).

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAS NOT PROPERLY INVOKED JURISDICTION.

Petitioner has sought to invoke this court's jurisdiction under 28 U.S.C. §1254(1); 28 U.S.C. §2101(c); and Rule 20.2

and 20.4 of the Rules of this Court (PC 4). Three of these deal with the timing and mechanics of filing a Petition for Certiorari; only one deals with the cases in which certiorari may be granted.

28 U.S.C. §1254(1) provides the situations in which this court may issue certiorari to a court of appeals. It is under this statute petitioner seeks to invoke jurisdiction. There is another statutory provision which confers authority to issue certiorari to a state court. For whatever reason, petitioner has not invoked it.

Since petitioner asks this court to issue certiorari under a statute dealing with decisions by courts of appeal, and since it is a state court decision of which petitioner complains here, he has not properly invoked jurisdiction and the petition should be dismissed.

II.

THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN OREGON VS. ELSTAD, 470 U.S. 298 (1985).

In Miranda vs. Arizona, 384 U.S. 436 (1966), this court set forth the warnings which law enforcement must give a suspect before they question him. Oregon vs. Elstad, 470 U.S. 298 (1985) held that a statement proceeded by Miranda warnings was not automatically excluded because of a previous statement given by the accused without benefit of such warnings. Nothing in the decision of the court below in any manner conflicts with that holding.

The decision petitioner seeks to have reviewed arose out of a rehearing which the court limited to two issues (A 3). The first of these issues was whether Satter's statements to the sheriff were voluntary and admissible (A 3). Because of its decision

such statements were not admissible, the court declined to consider the remaining issue (A 3).

The only issue with which the court below dealt was whether the first unwarned statements made to Sheriff Berg were admissible. It did not deal with admissibility of the subsequent statements which were proceeded by Miranda warnings. In fact, it specifically declined to consider that question believing the habeas court was the more appropriate forum for dealing with whether subsequent statements or evidence were tainted by the prior unwarned statement (A 14-15).

Petitioner asserts the refusal of the South Dakota Supreme Court to apply the holding of Elstad has created a conflict with numerous state and federal decisions, which conflict should be resolved by this Court (A 23-25). The fact is: The decision below

does not conflict with Elstad, or with any other case which deals with admissibility of subsequent statements after an earlier unwarned statement. It can't be in conflict with such cases because it specifically refused to deal with that issue (A 14-15).

CONCLUSION

Petitioner has failed to cite any statute or Rule giving this Court authority to grant certiorari. Nor is the decision he wishes reviewed in conflict with Elstad or state and federal appeals courts which have applied Elstad.

Respondent respectfully requests the Petition for Certiorari be denied.

Dated this 1st day of May, 1989.

Respectfully submitted,

BRAITHWAITE LAW OFFICES
Suite 222, Security Bldg
101 South Main
Sioux Falls, SD 57102
Attorney for Respondent

Supreme Court, U.S.
F I L E D
MAY 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1661

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RICHARD RIST, ACTING WARDEN
SOUTH DAKOTA STATE PENITENTIARY,

Petitioner,

v.

STEVEN SATTER,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF SOUTH DAKOTA

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

ROGER A. TELLINGHUISEN
ATTORNEY GENERAL
State of South Dakota
Counsel of Record

Craig M. Eichstadt
Janine M. Kern
Assistant Attorneys General
State Capitol
Pierre, South Dakota 57501
Telephone: (605) 773-3215
Counsel for Petitioners

TABLE OF CONTENTS

	PAGE
REPLY TO JURISDICTIONAL STATEMENT	1
REPLY TO CONSTITUTIONAL PROVISIONS	2
REPLY TO STATEMENT OF THE CASE	2
REPLY TO RESPONDENT'S REASONS FOR DENYING THE WRIT	3
I. PETITIONER HAS PROPERLY INVOKED THIS COURT'S JURISDICTION.	3
II. THE DECISION BELOW DOES CONFLICT WITH OREGON v. ELSTAD, 470 U.S. 298 (1985).	4
CONCLUSION	6

TABLE OF AUTHORITIES

CASES	PAGE
Duckworth v. Eagan, No. 88-317, cert. granted, 57 U.S.L.W. 3259 (1988)	5
Oregon v. Elstad, 470 U.S. 298 (1985)	4, 5, 6
STATUTES:	
28 U.S.C. § 1254(1)	1, 4
28 U.S.C. § 1257(3)	1, 2, 4
28 U.S.C. § 2101(c)	1

NO. 88-1661

IN THE

SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1988

RICHARD RIST, ACTING WARDEN
SOUTH DAKOTA STATE PENITENTIARY,

Petitioner,

v.

STEVEN SATTER,

Respondent.

REPLY TO JURISDICTIONAL STATEMENT

Petitioner invokes this Court's jurisdiction under the provisions of 28 U.S.C. § 1257(3); 28 U.S.C. § 2101(c) and Rules 20.2 and 20.4 of this Court. The Petitioner and counsel apologize to the Court for improper citation of 28 U.S.C. § 1254(1) as the jurisdictional statute, and request

that this Court review the matter under § 1257(3), the proper statute.

REPLY TO CONSTITUTIONAL PROVISIONS

Respondent has cited a South Dakota constitutional provision. This provision is not cited to, nor is it relied upon, by the South Dakota Supreme Court decision sought to be reviewed.

REPLY TO STATEMENT OF THE CASE

In reply to Respondent's Statement of the Case, Petitioner states as follows:

1. The cause of the conversation with Sheriff Berg is plain. It was accurately described in the Petition. Petitioner acknowledges that Berg questioned Satter about bodies; that he did so intentionally; and that he did so without Miranda warnings. None of this affects the voluntariness of the statements in the due process sense.

2. The record is unclear as to all of the subjects of Respondent's polygraph

examinations, but it does indicate that one subject was these murders (HCT 69; App 314; App 126). Respondent does not deny the factual premise, set forth at Petition 11, that he did fail all polygraph examinations that related to these murders. Reply Brief 3-4.

3. It was not improper to refer to Petitioner's 1977 escape. The escape occurred long before the instant habeas petition, although the affidavit detailing the event was executed on February 14, 1989. APP 370-375.

REPLY TO RESPONDENT'S REASONS FOR DENYING THE WRIT

I

PETITIONER HAS PROPERLY INVOKED THIS COURT'S JURISDICTION.

Counsel for Respondent has correctly pointed out an error in citation of the statute providing this Court with jurisdiction. Petitioner acknowledges the

error, and extends his apology to the Court. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) not § 1254(1) as was erroneously set forth in the Petition. Petitioner believes that this error is not fatal to this Court's jurisdiction, and Respondent has cited no authority to the contrary. The question is whether this Court has jurisdiction, not whether Petitioner cited the correct statute.

II

THE DECISION BELOW DOES CONFLICT WITH OREGON v. ELSTAD, 470 U.S. 298 (1985).

In his reply on the merits, Respondent argues that, since the South Dakota Supreme Court did not decide that the subsequent statements to Agent Peterson were inadmissible, the decision does not conflict with Oregon v. Elstad, supra. This argument overlooks and misapprehends the Petition.

The Petition seeks review of the South Dakota court's holding that an extensive "fruit of the poisonous tree" analysis must be undertaken when voluntary, fully warned statements follow unwarned, although voluntary, statements. Elstad held that such an analysis is not necessary, and no "clear break" between the statements need be shown, where the prior, unwarned statement was voluntary in the due process sense. 470 U.S. at 307-308; 310-311. This holding has been applied in the cases set out in the Petition, n.1 at 23-25. In addition, a similar question is presented in Duckworth v. Eagan, No. 88-317, cert. granted, 57 U.S.L.W. 3259; argued March 29, 1989.

Respondent does not address the harmless error issue. It is plain, however, that any analysis of harmless error is significantly affected by the question of the admissibility of the statements to Agent Peterson, and

whether or not a "clear break" or "fruit of the poisonous tree" analysis is required before their admission.

CONCLUSION

Improper citation of this Court's jurisdictional statutes in a petition for certiorari should not be fatal, and has been corrected by this reply brief. The decision below does conflict with Elstad and other decisions. It imposes a substantial, unjustified burden on South Dakota law enforcement. Respondent therefore requests that the petition for certiorari be granted.

Dated this 5th day of May, 1989.

Roger A. Tellinghuisen
ROGER A. TELLINGHUISEN
ATTORNEY GENERAL
STATE OF SOUTH DAKOTA
Counsel of Record
Craig M. Eichstadt
CRAIG M. EICHSTADT
JANINE KERN
Assistant Attorneys General
State Capitol
Pierre, South Dakota 57501-5
(605) 773-3215